











THE  
**Law Magazine and Review.**  
A QUARTERLY REVIEW OF  
JURISPRUDENCE.

*Being the combined Law Magazine, founded in 1828,  
and Law Review, founded in 1844.*

(FIFTH SERIES, Vol. XL, 1914-1915.)

---

LONDON:  
JORDAN & SONS, LIMITED,  
116, CHANCERY LANE, W.C.

1915.

LONDON:

PRINTED BY ROWORTH AND COMPANY, LIMITED,  
NEWTON STREET, HIGH HOLBORN, W.C.

# Law Magazine and Review.

---

## INDEX TO VOL. XL, FIFTH SERIES, 1914-1915.

	PAGE
AIRCRAFT ATTACKS ... ... ... ...	257
ARMING OF MERCHANTMEN ... ... ...	46
BASTARDY CASES, CORROBORATION IN ...	178
BOOKS REVIEWED:—	
<i>A.B.C. Guide to Practice 1915</i> ...	118
ACHARYYA, <i>Codification in British India</i> ...	111
Alpe's <i>Stamp Duties</i> ...	128
ALVERSTONE, <i>Recollections of Bar and Bench</i> ...	369
ANDERSON, <i>The Criminal Justice Administration Act 1914</i> ...	252
Annual County Courts Practice 1915 ...	373
Annual Practice 1915 ...	118
Archbold's <i>Lunacy and Mental Deficiency</i> ...	508
ATKINSON, <i>Magistrate's General Practice</i> ...	381
BARCLAY, <i>Law and Usage of War</i> ...	376
BATY, <i>Polarized Law</i> ...	111
BATY and MORGAN, <i>War: Its Conduct and Legal Results</i> ...	503
BELLOT, <i>The Temple</i> ...	127
Bell's <i>Sale of Food and Drugs Acts 1875 to 1907</i> ...	252
BENNETT, <i>Chancery of Lancashire Practice</i> ...	116
BENNETT, <i>History of the Bill of Lading</i> ...	246
BENNETT, <i>Laws against Nonconformity</i> ...	1
BENTHAM'S <i>Theory of Legislation</i> ...	109
BOSANQUET, <i>British Enactments in Native States</i> ...	377
Bouvier's <i>Law Dictionary</i> ...	379
BOWSTEAD, <i>Forms and Precedents</i> ...	117
BRADLEY, <i>Debtors and the War</i> ...	249
BRISSAUD, <i>History of French Public Law</i> ...	506
BROWN, <i>Underlying Principles of Modern Legislation</i> ...	122
BURROWS, <i>Income Tax relating to Business Profits</i> ...	255
Butterworths' <i>Twentieth Century Statutes</i> ...	505

	PAGE
<b>BOOKS REVIEWED (continued)—</b>	
<i>Butterworths' Workmen's Compensation Cases, Vol. VII...</i>	<i>383</i>
<i>Butterworths' Yearly Digest 1914...</i>	<i>511</i>
CARTER, <i>Elements of the Law of Contract</i>	<i>127</i>
Chitty's <i>Annual Statutes 1914</i>	<i>505</i>
<i>Conventions and Declarations concerning War, &amp;c.</i>	<i>376</i>
CORWIN, <i>The Doctrine of Judicial Review</i>	<i>247</i>
CREW, <i>Procedure at Meetings</i>	<i>384</i>
DARLING, <i>Scintilla Juris, and Meditations in the Tea Room</i>	<i>126</i>
DAVEY, <i>Law relating to the Mentally Defective</i>	<i>121</i>
DAVIES, <i>The Finance (1909-10) Act 1910, Cases and Amendments</i>	<i>383</i>
DICEY, <i>Law and Public Opinion in England</i>	<i>120</i>
DICEY, <i>Law of the Constitution</i>	<i>380</i>
DISNEY, <i>Carriage by Railway</i>	<i>508</i>
EMERY, <i>Concerning Justice</i>	<i>246</i>
<i>Encyclopaedia of the Laws of England, Vol. XVI</i>	<i>126</i>
<i>Every Man's Own Lawyer</i>	<i>512</i>
FLETCHER, <i>Contingent and Executory Interests in Land</i>	<i>374</i>
FRASER, <i>Law of Torts</i>	<i>256</i>
GLAISTER, <i>Medical Jurisprudence and Toxicology</i>	<i>507</i>
GOADBY, <i>Introduction to the Study of Law</i>	<i>250</i>
<i>Godefroi on the Law of Trusts</i>	<i>378</i>
GORE-BROWNE, <i>Effect of War on Commercial Engagements</i>	<i>249</i>
GOW, <i>Sea Insurance</i>	<i>248</i>
<i>Guide to the Bar, A New</i>	<i>123</i>
HIGGINS, <i>Armed Merchant Ships</i>	<i>46</i>
HODSOLL, <i>Practical Accounts for Executors</i>	<i>368</i>
HOLLAND, <i>Law relating to the Child</i>	<i>368</i>
HUDSON, <i>Building, &amp;c., Contracts</i>	<i>123</i>
HUNT, <i>Department of State of the United States</i>	<i>112</i>
JORDAN, <i>Company Law and Practice</i>	<i>510</i>
JORDAN, <i>Private Companies</i>	<i>254</i>
KEEN, <i>The World in Alliance</i>	<i>376</i>
KEY & ELPHINSTONE'S <i>Precedents in Conveyancing</i>	<i>253</i>
KOHLER, <i>Philosophy of Law</i>	<i>115</i>
LUMLEY'S <i>Public Health Acts</i>	<i>124</i>
MACMORRAN, <i>Local Government 1913-14</i>	<i>245</i>
MELVILLE, <i>Principles of Roman Law</i>	<i>504</i>
MEWS, <i>Annual Digest 1914</i>	<i>511</i>
MÖLLER and WOLFF, <i>Legal Proceedings Abroad</i>	<i>126</i>
PARSONS, <i>Workmen's Compensation Act 1906</i>	<i>254</i>
PATERSON'S <i>Licensing Acts</i>	<i>382</i>

## INDEX TO VOL. XL.

V

PAGE

## BOOKS REVIEWED (continued)—

<i>Railway and Canal Traffic Cases, Vol. XV</i>	...	...	505
<i>RIDGES, Constitutional Law of England</i> ...	...	...	380
<i>ROSE, The Origins of the War</i> ...	...	...	371
<i>SCHUSTER, Effect of War and Moratorium on Commercial Transactions</i> ...	...	...	249
<i>Seaborne's Law of Vendors and Purchasers</i> ...	...	...	127
<i>Select Bills in Eyre, A.D. 1292-1333</i> ...	...	...	243
<i>SMITH, Principles of Equity</i> ...	...	...	251
<i>SMITH and HICKS, Summary of the Law of Companies</i> ...	...	...	254
<i>SNELLING, Income Tax and Super-Tax Practice</i> ...	...	...	375
<i>Snell's Principles of Equity</i> ...	...	...	510
<i>SPAIGHT, Aircraft in War</i> ...	...	...	248
<i>SPENCER BOWER, Law relating to Actionable Non-Disclosure</i> ...	...	...	372
<i>STOCKTON, Outlines of International Law</i> ...	...	...	365
<i>Stone's Insurance Cases</i> ...	...	...	119
<i>STRAHAN, Law of Partnership</i> ...	...	...	110
<i>STROUD, Mens Rea</i> ...	...	...	244
<i>SWEET &amp; MAXWELL'S Guide to the Legal Profession</i> ...	...	...	123
<i>THWAITES, Criminal Law and Procedure</i> ...	...	...	252
<i>TIVERTON, Prize Law</i> ...	...	...	68
<i>TOPHAM, Company Law</i> ...	...	...	254
<i>TREGARTHEN, Law of Hearsay Evidence</i> ...	...	...	373
<i>TROTTER, Law of Contract during War</i> ...	...	...	377
<i>VINOGRADOFF, Oxford Studies in Social and Legal History</i> ...	...	...	113
<i>VOYSEY, Inland Revenue Arbitrations</i> ...	...	...	383
<i>Wigram's Interpretation of Wills</i> ...	...	...	251
<i>Williams' Bankruptcy</i> ...	...	...	509
<i>WILLIS, The Workmen's Compensation Act</i> ...	...	...	254
<i>WILSHIRE, Analysis of Williams on Real and Personal Property</i> ...	...	...	127
<i>Year Books of Edward II. Vol. VI, 4 Edward II, A.D. 1320-II</i> ...	...	...	108
<i>Yearly County Court Practice, 1915</i> ...	...	...	373
<i>Yearly Practice of the Supreme Court, 1915</i> ...	...	...	119
<b>CHURCH AND STATE</b> ...	...	...	1
<b>CIVIL JUDICIAL STATISTICS 1913</b> ...	...	...	318
<b>COMMISSION OF LIEUTENANCY IN THE COUNTIES: ITS HISTORY AND FUNCTIONS</b> ...	...	...	385
<b>CONTRABAND OF WAR</b> ...	...	...	195

## CONTRIBUTORS:—

ATHERLEY-JONES, His Honour Judge, <i>Contraband of War</i> ...	195
ATKINSON, CHAS. M., <i>Corroboration in Bastardy Cases</i>	178
BATY, TH., <i>Holland and the Scheldt</i> ...	62
BELLOT, HUGH H. L., <i>Self-Government in the Inns of Court, 29; Trial by Court-Martial, 151; The Commission of Lieutenantcy in the Counties: Its History and Functions</i> ...	385
CLEVELAND, ARTHUR, <i>Defamation in the Local and Ecclesiastical Courts</i> ...	271
FORMOV, R. R., <i>Householder's Liability for Damage caused by Falling Tiles, etc.</i> ...	282
HENDERSON, J. S., <i>Gleanings from old Scots Law: The Law of Death-bed</i> ...	298
LOVAT-FRASER, J. A., <i>The MacNaughton Case</i> ...	23
MCCURDY, C. A., <i>The Arming of Merchantmen</i> ...	46
MCAIR, ARNOLD D., <i>Habitual Criminals and Scottish Convictions</i> ...	411
NEWBOLT, FRANK, <i>The Rule Committee and its Work</i>	129
PHILLIMORE, G. G., <i>Church and State</i> ...	1
ROSENBAUM, SAMUEL, <i>The Rule Committee and its Work</i>	138
SIBLEY, N. W., <i>Submarine Piracy</i> ...	463
SMITH, HERBERT A., <i>Sales "Without Reserve"</i> ...	173
WILKINSON, W. E., <i>Some Changes in the Law of Neutralisation, 187; Reprisals in Warfare, 289; International Law and the Law of the Land</i> ...	447
WINFIELD, PERY H., <i>Aircraft Attacks</i> ...	257
 CORROBORATION IN BASTARDY CASES ...	178
COURT-MARTIAL, TRIAL BY ...	151
CRIMINAL STATISTICS 1913 ...	306
CRIMINALS, HABITUAL, AND SCOTTISH CONVICTIONS ...	411
CURRENT NOTES ON INTERNATIONAL LAW ...	75, 208, 334, 473
DAMAGE CAUSED BY FALLING TILES, ETC., HOUSEHOLDER'S LIABILITY FOR ...	282
DEATH-BED, THE LAW OF ...	298
DEFAMATION IN THE LOCAL AND ECCLESIASTICAL COURTS ...	271

## INDEX TO VOL. XL.

vii

	PAGE
ECCLESIASTICAL COURTS, DEFAMATION IN THE LOCAL AND...	271
EFFECT OF WAR ON INSTALMENT DELIVERIES ...	417
GLEANINGS FROM OLD SCOTS LAW: THE LAW OF DEATH-BED ...	298
HABITUAL CRIMINALS AND SCOTTISH CONVICTIONS ...	411
HISTORY AND FUNCTIONS OF THE COMMISSION OF LIEUTENANCY IN THE COUNTIES ...	385
HOLLAND AND THE SCHELDT ...	62
HOUSEHOLDER'S LIABILITY FOR DAMAGE CAUSED BY FALLING TILES, ETC. ...	282
INNS OF COURT, SELF-GOVERNMENT IN ...	29
INSTALMENT DELIVERIES, EFFECT OF WAR ON ...	417
INTERNATIONAL LAW:—	
AIRCRAFT ATTACKS ...	257
ALIEN ENEMIES ...	215, 343
AMERICAN NOTE, THE ...	217
AMERICAN NOTES ...	486
ANNEXATION ...	211
<i>Antares, The</i> —REQUISITION ...	345
ARBITRATION, T. WILLING BALCH AND ...	79
ARMING OF MERCHANTMEN ...	46
BALCH AND ARBITRATION ...	79
BELGIUM ...	342
CAPTOR'S FREIGHT— <i>The Roland</i> ...	341
<i>Clan Grant, The</i> —NATIONAL CHARACTER ...	340
COMBATANTS AND NON-COMBATANTS ...	477
COMMERCIAL IMPOSSIBILITY ...	485
CONTRABAND, IRON ORE AS ...	81
CONTRABAND OF WAR ...	195
DESTRUCTION OF NEUTRAL SHIPPING ...	473
EFFECT OF ORDERS IN COUNCIL ...	483
ENEMY, TRADING WITH ...	474
ENEMY CHARACTER ...	83
ENEMY SHAREHOLDERS ...	476
FI. FA. STOPPED BY LICENCE ...	479
FORCE MAJEURE ...	344
FREIGHT, <i>pro rata itineris</i> ...	308

	PAGE
<b>INTERNATIONAL LAW (continued)—</b>	
<b>GERMAN SHIPS, SALE OF</b> ...	81
<b>GERMAN WAR-PRACTICE</b> ...	78
<b>HOLLAND AND THE SCHELDT</b> ...	62
<b>INTERNATIONAL LAW AND THE LAW OF THE LAND</b> ...	447
<b>INTERNMENT</b> ...	85
<b>IRON ORE AS CONTRABAND</b> ...	81
<b>LUXEMBERG AND BELGIUM</b> ...	77
<i>Miramachi, The</i> — <b>PRE-WAR SHIPMENTS</b> ...	214
<b>NATIONAL CHARACTER—The Clan Grant</b> ...	340
<b>NEUTRAL LIENS—The Odessa</b> ...	214
<b>NEUTRAL SHIPPING, DESTRUCTION OF</b> ...	473
<b>NEUTRAL VESSELS, RESERVISTS ON</b> ...	87
<b>NEUTRALS, SALE OF WAR SHIPS TO</b> ...	84
<b>NON-COMBATANTS AT SEA</b> ...	334
<i>Odessa, The</i> — <b>NEUTRAL LIENS</b> ...	214
<b>ORDER IN COUNCIL OF 11TH MARCH, 1915</b> ...	337
<b>ORDERS IN COUNCIL, EFFECT OF</b> ...	483
<i>Oriental, The</i> — <b>SHIP'S NEUTRALITY</b> ...	346
<i>Panariellos, The</i> ...	338
<b>PRE-WAR SHIPMENTS—The Miramachi</b> ...	214
<b>PRIZE CASES</b> ...	75
<b>PRIZE COURTS, MUNICIPAL PRACTICE IN</b> ...	482
<b>REPRISALS IN WARFARE</b> ...	289
<b>REQUISITION—The Antares</b> ...	345
<b>REQUISITION <i>pendente lite</i>—The Zamora</b> ...	480
<b>RESERVISTS ON NEUTRAL VESSELS</b> ...	87
“ <b>RESTRAINT OF PRINCES</b> ” ...	347
<b>RETALIATION IN WAR</b> ...	342
<b>RETALIATION IN TRADE</b> ...	335
<i>Roland, The</i> — <b>CAPTOR'S FREIGHT</b> ...	341
<i>Roumanian, The</i> — <b>SEIZURE ON LAND</b> ...	219
<b>SALE OF GERMAN SHIPS</b> ...	81
<b>SALE OF WAR SHIPS TO NEUTRALS</b> ...	84
<b>SCHELDT, HOLLAND AND THE</b> ...	62
<b>SEIZURE ON LAND—The Roumanian</b> ...	219
<b>SHIP'S NEUTRALITY—The Oriental</b> ...	346
<b>SUBMARINE PIRACY</b> ...	463
<b>TRADE, RETALIATION IN</b> ...	335
<b>TRADING WITH THE ENEMY</b> ...	474
<b>TURKISH CAPITULATIONS</b> ...	84
<b>WARFARE, REPRISALS IN</b> ...	289
<b>WAR SHIPS, SALE OF, TO NEUTRALS</b> ...	84
<b>WHAT IS A “BRANCH”?</b> ...	484
<i>Zamora, The</i> — <b>REQUISITION <i>pendente lite</i></b> ...	480

## INDEX TO VOL. XL.

ix

	PAGE
INTERNATIONAL LAW AND THE LAW OF THE LAND	447
INTERNATIONAL LAW, CURRENT NOTES ON ...	75, 208, 334, 473
JUDICIAL STATISTICS, ENGLAND AND WALES, 1913: CRIMINAL, 306; CIVIL	318
LAW OF PRIZE	68
LAW OF THE LAND, INTERNATIONAL LAW AND THE	447
LIEUTENANCY IN THE COUNTIES, HISTORY AND FUNCTIONS OF THE COMMISSION OF	385
MACNAUGHTON CASE	23
MERCHANTMEN, THE ARMING OF	46
NATURALISATION, SOME CHANGES IN THE LAW OF	187
NOTES ON RECENT CASES	88, 223, 348, 488
PIRACY, SUBMARINE	463
PRISONS, REPORT OF THE COMMISSIONERS OF, FOR THE YEAR 1913-14	51
PRIZE, THE LAW OF	68
RECENT CASES:—	
<i>A. B. v. C. B.</i>	99
<i>Ainsworth, In re, Finch v. Smith</i>	492
<i>Aldin v. Stewart</i>	498
<i>Allen &amp; Sons v. King</i>	502
<i>Archer's Estate, In re</i>	104
<i>Ashburton, Lord v. Noctin</i>	90, 224
<i>Attorney-General v. Sharpness New Dock, and Gloucester &amp; Birmingham Navigation Co.</i>	95
<i>Attorney-General of Southern Nigeria v. John Holt &amp; Co. (Liverpool) Ltd.</i>	488
<i>Baird &amp; Co. v. Ancient Order of Foresters</i>	97
<i>Baker v. The Corporation of Glasgow</i>	495
<i>Bradshaw v. McMullen</i>	501
<i>Burrell v. Burrell's Trustees</i>	359
<i>Caledon (Earl), In re, Alexander v. Caledon (Earl)</i>	351
<i>Carlberg v. The Wemyss Coal Co. Ltd.</i>	493

INDEX TO VOL. XL.

	PAGE
<b>RECENT CASES (continued) —</b>	
<i>Charing Cross Electricity Supply Coy. v. Hydraulic Power Co.</i> . . . . .	238
<i>Commissioners of Inland Revenue v. Miller</i> . . . . .	360
<i>Cotton's Trustees v. Farmer</i> . . . . .	495
<i>Dalziel, School Board of the Parish of v. The Scottish Education Dept.</i> . . . . .	235
<i>Davies, In re, Lloyd v. Cardigan County Council</i> . . . . .	489
<i>Dawson, In re, Pattison v. Bathurst</i> . . . . .	490
<i>Dunlop Pneumatic Tyre Co. Ltd. v. New Garage and Motor Co.</i> . . . . .	348
<i>English v. Cliff</i> . . . . .	92
<i>Fengl v. Fengl</i> . . . . .	353
<i>Folkestone Corporation v. Brockman</i> . . . . .	95
<i>Gibson v. Fotheringham</i> . . . . .	103
<i>Glamorgan Coal Co. v. Glamorganshire Standing Committee and others</i> . . . . .	355
<i>Glasgow Insurance Committee v. Scottish Insurance Commissioners</i> . . . . .	361
<i>Glass v. Commissioners of Inland Revenue</i> . . . . .	359
<i>Goswell's Trusts, In re</i> . . . . .	493
<i>Gramophone Co. v. King</i> . . . . .	242
<i>Greene, In re</i> . . . . .	239
<i>Groos, In re, Groos v. Groos</i> . . . . .	490
<i>H.M. Advocate v. Invites</i> . . . . .	358
<i>Hamilton v. Clancy</i> . . . . .	240
<i>Hargrove, In re, Hargrove v. Pain</i> . . . . .	352
<i>Harris, In re, Harris v. Harris</i> . . . . .	88
<i>Heard v. Gabbett</i> . . . . .	501
<i>Higgins v. Beauchamp</i> . . . . .	232
<i>Hill v. Black</i> . . . . .	100
<i>Holland, In re, Holland v. Clapton</i> . . . . .	226
<i>Hunter v. Coleman</i> . . . . .	107
<i>Irish Land Commission v. O'Neill</i> . . . . .	364
<i>Keary v. Archibald Russell Ltd.</i> . . . . .	360
<i>King v. Ketteridge</i> . . . . .	354
<i>King v. Sagar</i> . . . . .	233
<i>Lecky v. Walter</i> . . . . .	241
<i>Leslie v. Sheill</i> . . . . .	228
<i>McTaggart v. Wm. Barr &amp; Sons Ltd.</i> . . . . .	237
<i>Millbourn v. Lyons</i> . . . . .	91
<i>Milligan &amp; Co. Ltd. v. Ayr Harbour Trustees</i> . . . . .	102, 496
<i>Monolithic Building Co., In re, Tacon v. The Company</i> . . . . .	492
<i>Morrison v. London County and Westminster Bank Ltd.</i> . . . . .	94
<i>Murphy &amp; Co. Ltd. v. Crean</i> . . . . .	501

INDEX TO VOL. XL.

**RECENT CASES (continued) —**

	PAGE
<i>Nasmith's Trustees v. National Society for the Prevention of Cruelty to Children</i> ... ... ... ...	101, 349
<i>O'Brien v. Oceanic S. N. Co.</i> ... ... ... ...	230
<i>O'Connell v. Oceanic S. N. Co.</i> ... ... ... ...	230
<i>Oliver, In re</i> ... ... ... ...	105
<i>O'Neill v. McGrorty</i> ... ... ... ...	362
<i>Orenstein &amp; Koppell v. Egyptian Phosphate Co.</i> ...	234
<i>Peebles v. Cowen &amp; Co.</i> ... ... ... ...	497
<i>Perry v. Fitzgerald</i> ... ... ... ...	364
<i>Powell Duffryn Steam Coal Co. v. Glamorganshire Standing Joint Committee</i> ... ... ... ...	355
<i>Raven, In re, Spencer v. The National Association for the Prevention of Consumption, and Reginald Pratt</i> ...	489
<i>Rex v. Norton</i> ... ... ... ...	96
<i>Robinson &amp; Co. v. Continental Insurance Co. of Mannheim</i>	354
<i>Koscoe (Bolton) Ltd. v. Winder</i> ... ... ... ...	350
<i>Rothersand, The</i> ... ... ... ...	353
<i>Ryan v. Oceanic S. N. Co.</i> ... ... ... ...	230
<i>St. John Peerage Case</i> ... ... ... ...	350
<i>Savory Ltd. v. World of Golf Ltd.</i> ... ... ... ...	227
<i>Scanlon v. Oceanic S. N. Co.</i> ... ... ... ...	230
<i>Sheane v. Featherstonhaugh</i> ... ... ... ...	104
<i>Sheehy v. Nugent</i> ... ... ... ...	363
<i>Steamship Beechgrove Co. Ltd. v. Aktieselskabet "Fjord" of Kristiania</i> ... ... ... ...	356
<i>Stevenson v. Roger</i> ... ... ... ...	236
<i>Sutherland, In re Mary Caroline, Dowager Duchess of, Mitchell v. Burne (Countess)</i> ... ... ... ...	227
<i>Tommi, The</i> ... ... ... ...	353
<i>Virte, In re, Vaiani v. De Virte</i> ... ... ... ...	492
<i>Volkl v. Rotunda Hospital</i> ... ... ... ...	242
<i>Wallace v. Bergius</i> ... ... ... ...	237
<i>Wasserberg, In re, Union of London &amp; Smiths Bank Ltd. v. Wasserberg</i> ... ... ... ...	352
<i>Watney, Combe, Reid &amp; Co. v. Berners</i> ... ... ... ...	92
<i>Watson v. Donaldson</i> ... ... ... ...	499
<i>Westergaard v. Westergaard</i> ... ... ... ...	102
<i>Wilson v. Glasgow &amp; South Western Railway Co.</i> ...	357
<b>RECENT CASES, NOTES ON</b> ... ... ... ...	<b>88, 223, 348, 488</b>

**REPORT OF THE COMMISSIONERS OF PRISONS FOR THE  
YEAR 1913-14** ... ... ... ...

51

	PAGE
REPRISALS IN WARFARE ...	289
REVIEWS ...	108, 243, 365, 503
RULE COMMITTEE AND ITS WORK ...	129
SALES "WITHOUT RESERVE" ...	173
SCHEIDT, HOLLAND AND THE ...	62
SCOTS LAW, GLEANINGS FROM: THE LAW OF DEATH-BED...	298
SCOTTISH CONVICTIONS, HABITUAL CRIMINALS AND...	411
SELF-GOVERNMENT IN THE INNS OF COURT ...	29
SOME CHANGES IN THE LAW OF NATURALISATION ...	187
STATE CHURCH AND ...	1
STATISTICS, JUDICIAL, 1913: CRIMINAL 306; CIVIL ...	318
SUBMARINE PIRACY ...	463
TRIAL BY COURT-MARTIAL ...	151
WAR, CONTRABAND OF ...	195
WAR, EFFECT OF ON INSTALMENT DELIVERIES ...	417
WARFARE, REPRISALS IN ...	289
"WITHOUT RESERVE" SALES ...	173

THE  
LAW MAGAZINE AND REVIEW.

No. CCCLXXV.—FEBRUARY, 1915.

I.—THE RULE COMMITTEE AND ITS WORK.

I.

THE *Annual Practice* for 1915 consists of a volume of over 2,400 pages, preceded by 164 pages of preliminary matter, and finished off by 382 pages of Index. The first half of the book deals with the Rules of the Supreme Court, which are more than 1,100 in number. These rules are the flywheels and cogwheels, the shafting and braces, the bolts and nuts of the machinery of the law, and their custody, with the duty of continual inspection and repair, casts a heavy responsibility upon the Rule Committee. This is a statutory body which has gradually assumed its present form, and a glance at its constitution will be sufficient to show that in theory it would be difficult to improve upon it. It consists of the Lord Chancellor and any four of the following—the Lord Chief Justice, the Master of the Rolls, the President of the Probate, Divorce and Admiralty Division, four other judges, two members of the Bar Council, a member of the Council of the Law Society, and a member of a provincial Law Society. The decisions of such a body must command the respect of the whole profession; but a complaint was made before the Royal Commission on Delay in the King's Bench Division

that there is no effective method of calling their attention to questions of practice and procedure, and that defects exist, and there is no means by which the exact nature of the question or defect can be explained to them.

This means that, although any decision given would be satisfactory, no decision can be given upon a question that has not been raised. Further light is thrown on the position by the evidence of the Lord Chancellor, who, in discussing the statutory annual meeting of the Judges, and in expressing the opinion that such a meeting was useless, said of the Rule Committee (Vol. II, p. 191) : " My experience is that, unless we have arranged beforehand very much by communication what we have to do, the time is not long enough, and the opportunity is not sufficient, to talk these things over."

But the Royal Commission recommended the Committee to consider some of the suggestions for improvement in the practice which were put forward in the evidence of experts, and there are others which can be made, also well worthy of attention. The magnitude of the task may be considerable, but it is of such importance to the community to have logical, consistent, and intelligible rules that the labour would be well spent.

Take for instance the thirty-four rules of Order XXXI, Discovery and Inspection, and consider that part which deals with Interrogatories only. Rule 2 has been in operation for twenty-one years, and provides that all proposed interrogatories shall be submitted to the Master before being allowed. On the whole, it is probably the general opinion that this innovation on the old practice has worked well, so well indeed that experienced practitioners often learn with astonishment that in the County Court, where expense is necessarily kept down, or on the other hand, where remitted actions may be tried, any number of interrogatories may be allowed *ex parte* by a registrar who does

not see the result at the trial, but whether the rule is good or bad, it is surely time to recognise that some of the other rules are quite inconsistent with it. By Rule 1, not more than one set of interrogatories may be delivered to the same party without an order. As not even one may be delivered without an order, this is mere surplusage. By Rule 3, if interrogatories have been exhibited unreasonably, vexatiously, or at improper length, the costs occasioned by them, and the answers, shall be paid in any event by the party in fault, but if the Master has had the interrogatories submitted to him, and has allowed them, there can be no party in fault, and the provisions of this rule are obsolete. So also are those of Rule 7, which permit an application within seven days to set aside unreasonable or vexatious, or to strike out prolix, oppressive, unnecessary, or scandalous interrogatories. These non-effective rules can only remain by an oversight due to the absence of suggestion, the vast number of rules which require at least annual consideration, or to the scanty time at the disposal of the Committee.

Rules 6 and 25 are almost as objectionable.\* The former entitles the party answering to take objection in the affidavit to any scandalous or irrelevant interrogatory, or to one not put *bona fide* for the purpose of the cause or matter, but he has already taken the objection on the summons, and he has a decision against him, and has not appealed, or has appealed unsuccessfully. To take the same objection in the answer would be futile, and would merely expose him to the penalty of costs. The latter, Rule 25, is even more out of place. It purports to protect the litigant against oppressive interrogatories, which, of course, would not be allowed by the Master, or the Judge, or the Court of Appeal, by providing that the costs of the party seeking discovery, costs now included in the order, and invariably made costs in the cause, shall be allowed as part of the costs where and where only such discovery shall appear to the Judge at the trial, or

If there is no trial, to the Court or a Judge (i.e., a Master, on some obsolete form of summons), or shall appear to the taxing officer to have been reasonably asked for.

Read with Rule 2 the continued existence of this rule is indefensible.

We have, then, a code of a dozen rules which are inconsistent, contradictory and confusing, and have been allowed to remain so for twenty-one years.

The Rule Committee would probably agree with what has been said, and would, perhaps, urge that their heavy and unpaid work in connection with such matters as the new rules for Regulating Procedure by and against Poor Persons, must be their excuse, but this does not meet the point, for not only does it not protect their predecessors in office, but it does not inform the public, or the profession, how, for instance, Order XXXI can be arraigned at the Bar where they sit as judges.

Order XXX has been definitely referred to them by the Royal Commission, and will, no doubt, in course of time, receive due consideration. The suggestion here made is that the Masters or a committee of experts should be asked to report concisely to the Rule Committee upon this and cognate matters. A report, for instance, from a Master, two practising junior barristers, and two managing clerks, would throw a flood of light on the subject. The Master knows much, but some managing clerks not only have a wide knowledge of the practice, but they know intimately all the Masters' Chambers, which no Master can really do, and they know how the various defects and delays touch the interests of clients, and what it amounts to in money. It is not their business to be zealous reformers, but they would report upon Order XXX with refreshing candour. I am informed that in former years a special committee of the Solicitors' Managing Clerks' Association did occasionally communicate with the Rule Committee, and succeeded in

## THE RULE COMMITTEE AND ITS WORK.

effecting some minor alterations in the rules, but that this effort has ceased.\*

Before proceeding to discuss the rules in connection with the all-important subject of costs, it may be noted in passing that the absence of any means of communicating with the Rule Committee prevents the removal of quite small defects which nevertheless involve innocent people in unnecessary expense, and mar the efficiency of our procedure. Take for instance the present Interpleader Rules which replace the repealed statutory provisions and the Rules of 1875. Interpleader is the process whereby a person in the possession of property not his own is enabled to call upon rival claimants to such property to appear before the Court, in order that the right to such property, as between such claimants, may be determined (*Annual Practice*, p. 1082). It is familiar to every practitioner, and forms part of the machinery of the Courts which is in use every day. The applicant, or person seeking relief, may have money in his hands to which there are two claimants, or he may be the sheriff who has taken in execution disputed goods. He must be independent of both parties to the dispute, though he may be the defendant in an action, and he must take out a Summons under Order LVII. An order may then be made for an issue between the claimants to be stated and tried, and it is upon this trial, and the difficulties which not infrequently arise upon it, that the aid of the supervising committee is invoked.

When the matter is of sufficient importance for a High Court trial, or the statement of a special case on a question of law, no difficulty arises, but cases of this kind are rare. Most interpleader issues are dealt with by the Master, although some are remitted to the County Court.

By Rule 8, which follows the Common Law Procedure Act 1860, the Master may, with the consent of both claimants, or on the request of any claimant (which seems to

make the earlier phrase redundant), if, having regard to the value of the subject-matter in dispute it 'seems' desirable so to do, dispose of the merits of their claims, and decide the same in a summary manner and on such terms as may be just.

This rule is acted upon every day, whether the Master deals with a question of law only, a matter which by another rule involves the possibility of stating a case for the opinion of the Court, or whether he decides a question of fact. In practice it is found unnecessary to state a case. The Master hears the summons, and either comes to a decision, or adjourns it for further hearing, or orders an issue. Very often this issue, like the adjourned hearing, comes on before the same Master. It sometimes involves oral evidence, sometimes admissions of fact: it may take half-an-hour, or half-a-day. If it can be said to be decided in a summary manner there is the usual appeal to the Judge in Chambers, whereas if the procedure is not summary, and no one knows where the line is drawn, the Master ceases to act as such and becomes a referee, from whom an appeal lies to a Divisional Court.

The convenient, economical, and popular practice of trying the case before the Master is not based upon any rule, and was not contemplated by the framers of the rules. It is pretty clear that they never thought of an appeal from a Master direct to the Divisional Court, but the present practice has become so firmly established that it is not uncommon for the parties to agree that there shall be no appeal, or that the appeal, if any, shall be specifically either to the judge or the Court, that is to say, that no objection will be taken by the party to the tribunal of appeal.

If the Masters, or some such expert advisers as are mentioned above, were to report to the Rule Committee upon the present practice under Order LVII, no doubt other points would arise. Under another set of rules a party often loses his right to a jury without knowing it.

A larger matter remains for notice. It will be generally conceded that one of the most important subjects dealt with by the rules is that of costs. It is the fount of endless disputes and heart-burnings, and although it is so complicated and difficult that it requires both courage and industry to approach its consideration, it should not be beyond the powers of so great a body as the Rule Committee, if only it had time, to effect serious reforms in the direction of simplicity, certainty, and fairness. To say that the present rules cannot be improved is a counsel of despair.

Order LXV, which contains nearly ninety rules, is the general order dealing with costs, and it occupies with its explanatory notes 114 pages of the *Annual Practice*, but there will be found in the previous pages no less than 115 rules which deal, in some way or other, with details of the same subject. Probably no one who had not made a special study of this most arid and repellent branch of the law would believe the bare statement that costs are dealt with in over 200 rules, and it seems clear that, although it must be large, the number might be greatly reduced with advantage, and if reduction is once attempted some correction will be easy.

A vague suggestion of this kind is of no value, but on the other hand it is not possible in a single article to discuss in detail what might be done in the way of correction, compression, and simplification. The various numbers quoted above are meant to convey this intimation as forcibly as figures can.

But illustrations can be given which should be enough to attract attention.

Let us first take the case of a new rule which has been in use long enough to test its efficacy, but not long enough to become so deeply embedded in the practice, and so garnished with the decisions of the Courts that it is immune from attack, like an ancient landmark or an insanitary and dangerous, but historic, building.

Ought not the Rule Committee, for instance, to ask how Order XIV, Rule 9 (a), is working? How can any Master, counsel, solicitor or clerk try to arrange or even hope that the busiest and most eminent men in the profession will communicate with each other, in the words of the Lord Chancellor, on this not unimportant item before a committee meeting, as the time is not long enough when they meet?

The rule provides that, when the plaintiff knew that the defendant relied on a contention which would entitle him to unconditional leave to defend, and still persisted in taking out a summons for summary judgment against him, he shall not only pay the costs to the defendant, but pay them at once. If this were rigidly enforced it would destroy half the usefulness of the order under which nine-tenths of the King's Bench judgments are obtained, but it is not and cannot be rigidly enforced, as a single example will show, and a rule which is capriciously enforced is far worse than no rule at all.

A plaintiff brings an action for, say, goods sold and delivered, to which there is no defence in law or in fact, and he takes out a summons for judgment. Before the Master the defendant's counsel produces a verified copy of a letter from the defendant to the plaintiff saying that there has been a breach of warranty and that the goods are of little or no value, and, as not infrequently happens, reminding him of Rule 9. Both parties know that the statement of fact is untrue, but the Master does not. Leave to defend must be given, and the Master is bound by the rule to make the plaintiff pay forthwith to the defendant costs which amount on taxation to about £12.

Even if the defendant does not deliver a defence, even if the defendant is insolvent and puts the plaintiff to further expense, besides delay, and does not appear at the trial, the plaintiff has no means even by a prosecution for perjury—an almost impossible event, by the way—of getting back the

rule 12, of recovering his own costs of the summons, if reasonably and lawfully used, as it often does, the rule defeats its object. So much is this the case, that the application to enforce it is often, though unfortunately not always, refused.

The least modification that could be made would be to order payment into Court of the costs incurred, or still better, security to be given, which would avoid the costs of taxation.

To turn to another point, we find that by Order LXV costs shall be in the discretion of the Court or judge, except where there is a jury. This, with certain provisos, not necessary to mention here, is a rule of universal application, but we also find that this discretion is specially and unnecessarily mentioned in 38 other previous rules.

It is perhaps wearisome to give further examples of defects. There is Order LXV, Rule 12 (County Court costs where not more than £5 recovered), which has been obsolete for 11 years. The *Annual Practice* calls it "wholly inoperative," and only accords to it half-a-page of notes. Upon an annual revision, however slight, it would long ago have disappeared.

There are other points which arise on many of the orders, long overdue for amendment, but the above must suffice.

Can it be that the reason why we are so slow to move, and so unscientific in our ways, is that it is not to the interest of any members of the legal profession to make improvements? It is possible that no judge who devoted himself to the re-organisation of the *Wills Book* could hope to leave behind him a great name as a jurist, that no barrister would willingly choose to seek business of notoriety by irrevocably coupling his name with a repealed order or some new rules, and that no solicitor of eminence would think it worth while to waste himself upon what might be a useless effort.

Compared with other legal work it is a thankless task. It makes no appeal to self-interest, to ambition, or to duty. No Member of Parliament can spare a thought for it, no novelist has ever heard of it, no dramatist could understand it. The eleven hundred Rules, two hundred of which deal with costs, will go on perennially clogging the slow wheels of civil justice until some method is devised for bringing their defects to the notice of the Rule Committee without imposing upon that body the necessity for debating in a full meeting, all the numerous points, large and small, which must arise.

FRANK NEWBOLT.

---

## II.

In many American States the recent expressions of public dissatisfaction with the working of legal machinery have impelled the lawyers to advocate a reform from within, to take the shape of transferring to the judiciary the power to regulate procedure which is now exercised almost exclusively by the several State Legislatures. The English rule-making system is the model they point to. It does not detract from the manifest superiority of that system over one of direct legislation that there are minor details in which it might be improved, and it might be profitable to make some mention of objections which have been raised from time to time either to the system itself or to the manner in which the rule-making power has been used. In forty years much has been learned about defects in the former and mistakes in the latter. Some of them have been corrected, others are still the subjects of controversy.

First and foremost among adverse criticisms of the Rule Committee and the Rules is the long-continued complaint

about inconsistencies and contradictions which are alleged to abound in the text of the Rules. There were 1,100 Rules in 1883, when the R.S.C. were last revised, and since then over 500 Rules have been altered or added to the code. The criticism is that the rule-makers have occasionally failed to bear in mind the reciprocal effect of dozens of these Rules upon each other, and have passed amendments which, though adequately fulfilling the purpose for which they were primarily intended, conflict with other passages in the Rules whose text was left unchanged. It is almost a physical impossibility for judges, hard pressed by the demands and responsibilities of their work in the High Court and the Court of Appeal, to be so conversant with every phrase and section of so large a body of rules as to be able to guard against such errors. Contradictions are numerous in the Rules, and those whose business it is to study them closely, word for word from beginning to end, have often called attention to the fact.

Much was said and published upon this around 1893, when the drafting of amendments was not as careful as it has been at other times, and a strong demand for complete revision of the whole R.S.C. made itself felt. One of the letters written by Mr. Snow at that time put the matter in the following words:—

"Legal machinery grows yearly both in bulk and complexity—a growth which is likely to increase rather than diminish. It is at once the most uninviting and the most indispensable part of the law . . . . The mere bulk of the Rules of the Supreme Court is now very great, and many of the rules and groups of rules are so interdependent upon other rules or groups of rules, or upon sections of Acts of Parliament, that it is almost impossible to introduce a new rule, or a group of new rules, without bringing about results not foreseen. Having regard to the onerous duties of your office, it is impossible for your Lordships, or the Rule Committee, to have present to your minds, when dealing with

matters of procedure and practice, all, or even a large part, of the many points which are certain to arise when such rules are put into practice."<sup>1</sup>

Mr. Snow was for many years editor of the *White Book* (in which capacity he was able to gather information of many specific defects in the Rules), so that his statement carries the weight of experience and technical knowledge. His opinion was, to be sure, ratified by the Rule Committee when he was engaged to conduct a revision of the Rules in 1894, although the revision itself failed of acceptance.

Another expert on the Rules who has given public expression to his knowledge of inconsistencies in them is Master T. Willes Chitty, of the King's Bench Division, who has for some time edited the *Red Book*, the other annual commentary in the Judicature Acts and Rules. In his testimony before the 1913 Royal Commission on Delay in the King's Bench Division,<sup>2</sup> he laid much stress upon the failure of the Rules on summonses for directions to complement properly the Rules on proceedings under such summonses, and he commented upon the flat contradictions, in respect to pleadings, between many of the Rules and Forms. Master Charles Burney,<sup>3</sup> in his article on "Rules" in the *Encyclopaedia of the Laws of England*,<sup>4</sup> said of the present rule-making system—

"Valuable as these provisions have proved in simplifying the practice and procedure of the Courts, it cannot be denied that there is room for improvement. Inconsistencies, anachronisms, incongruities, are present in the Rules, which ought to be swept away."

These are opinions by quasi-judicial officers whose daily duty it is to apply the Rules to actual cases before them.

<sup>1</sup> Part of a letter in which he pointed out contradictions in the Rules newly made for the Arbitration Act 1893, the letter being published in *Law Journal*, 268 (May 3, 1893).

<sup>2</sup> Part Paper, 1913, Cat. 6,762, Minutes of Evidence, Vol. I, pp. 21 &c.

<sup>3</sup> *and ed.* (1908) *vol. XII* p. 59

These inconsistencies are due not only to a failure to bear in mind all the consequences of an amendment in a series of interdependent rules, but sometimes to slovenly or hurried draftsmanship.<sup>1</sup> This is another of the grounds of complaint against some of the R.S.C. Inlegant and careless drafting in statutory rules produces not only inconsistencies with other rules, but uncertainty as to the meaning of the Rules themselves. It must be acknowledged that by far the largest portion of the present code contains clear, concise English, which has stood the test of time and interpretation, and been copied in Rules of Court all over the Empire; but at certain periods in the thirty years of its life supervision over amendments was a trifle lax, and those periods have left their traces in the Rules. Public criticism on a point of this sort is usually somewhat reserved, but occasionally frank opinions get into print. For instance, this passage from a letter in a legal journal in 1886:—

"Practitioners have been and are solely distracted by the numerous alterations of the last ten years. . . . Practical men peruse the rules, from time to time altered, annulled, restored, and re-amended, and blush for the responsible authors."<sup>2</sup>

And this line, editorially written in the same journal in 1893:—

"One striking thing about Rules of the Supreme Court now a days is their lack of finish."<sup>3</sup>

Legislative drafting is an art that has been carried to a high degree of excellence in England, but there are some parts of the Rules whose form does not receive high commendation from the experts.

Objection is often raised to the frequency with which the Rules have been amended. Since 1853 nearly half the 1100 Rules in the Code have been amended or annulled. To a certain extent this was inevitable—changing conditions

<sup>1</sup> 30 *Solicitors' Journal*, 154 (January 2, 1886).

<sup>2</sup> 38 *Solicitors' Journal*, 124 (December 23, 1893).

called for changes in procedure; again, observation of the Rules at work brought out many points in which they could be improved, which it would have been wrong to neglect. But some critics appear to believe that the need for change has been exaggerated. Lord Davey, among them, in his article on "Judicature Acts" in the *Encyclopædia Britannica*,<sup>1</sup> said of the Rules:—

"Complaints are made that they go into too much detail, and place a burden on the time and temper of the busy practitioner, which he can ill afford to bear . . . . Rules have sometimes been made to meet individual cases of hardship, and rules of procedure have been piled up from time to time, sometimes embodying a new experiment, and not always consiste it with former rules."

Lord Davey was never a member of the Rule Committee. In similar vein is this outburst of a writer in the *Solicitors' Journal* in 1894<sup>2</sup>:—

"If anyone supposes that a solicitor with a good practice has time at his disposal to follow this bewildering kaleidoscope of procedure regulations, he has a most inadequate idea of the daily requirements of a solicitor's business. Solicitors are only human after all, and they are rapidly becoming oppressed by the masses of new procedure rules, and repeals of old rules, which are pitched into the pathway of their daily work with inconsiderate liberality."

Since that time four practitioners have been added to the Committee to give it an "adequate idea" of their requirements. There may be too many Rules issued by the Committee: it is a fault to be guarded against. It is, however, a fault far easier to put up with than the old rigidity of procedure that marked the period before the Rule Committee came into being. "It is the natural course in things judicial," says Mr. Birrell, in his entertaining essay on Bills

<sup>1</sup> Written for the 1902 Supplement to the 9th edition. In the present (the 11th) edition it appears, slightly revised, in Vol. XV, p. 541.

<sup>2</sup> 39 *Solicitors' Journal*, 92 (December 8, 1894).

in Equity,<sup>1</sup> "for a procedure to stiffen as in an arctic frost." Every batch of new rules, therefore, thaws out a bit of the stiffness.

A fourth cause of complaint occasionally heard against the Rule Committee is that its powers are too great. In 1883, when Lord Selborne's revision of the Rules was first published, there was some effort to have its taking effect postponed by Parliament, Lord Halsbury (then Sir Hardinge Giffard) leading the opposition in the Lower House. In his address<sup>2</sup> he protested against what he termed "this silent and secret mode of altering the law," and complained that the Rule Committee was able to legislate without public knowledge of its proceedings. This objection was eventually removed by the Rules Publication Act in 1893. The habit of Parliament to delegate to the Rule Committee and to similar authorities the power to supply the details for the operation of statutes has grown steadily, but the opinion is sometimes expressed that it is carried too far.

As one legal journal explains<sup>3</sup> :—

"The origin of this propensity to leave matters to be settled by rules was probably in part an appreciation of the convenience to a legislator who is in a hurry of presenting to Parliament a sketch only of his proposals, asking for authority to complete them by rules at his leisure; and in part, a notion that opposition to a measure will be obviated if debateable details will be left out of it. We have repeatedly called attention to the dangers of this practice."

Especially in the last few years, there has been great dissatisfaction with the manner in which controversial Acts have been rushed through Parliament, leaving wide discretionary authority to executive and judicial officers for the framing of rules to fill up their gaps. This is an objection which applies to all latter-day legislation, and

<sup>1</sup> *A Century of Law Reform*, p. 179 (London, 1901).

<sup>2</sup> *Hansard* (August 11, 1883).

<sup>3</sup> 37 *Solicitors' Journal*, 677 (August 5, 1893).

not only to statutes throwing such duties upon the Rule Committee.

Lastly, it has been argued that the very elasticity introduced into civil procedure by the rule-making system has been the source of tremendous litigation, and that thousands of reported decisions on procedural questions attest the extravagance of constant alterations that require fresh judicial interpretation. Mr. Henderson, in his *Development of Code Pleading*, makes the following remark, *apropos* of Mr. Snow's calculation that from 1875 to 1890, over 4,000 decisions were handed down in the English Courts upon questions of procedure<sup>1</sup>—

"Ever fruitful of contention and delay, a changeable procedure a grievous burden to the community, which must pay the price of interpreting all new regulations of procedure, whether by Rules of Court or direct enactments."

But the prospect is not quite so gloomy as all that, as a little inspection of the figures will show. In the 15 years for which Mr. Snow quotes, there were begun annually an average of 80,000 proceedings of all sorts in the several Divisions of the High Court; one sees at a glance how small a proportion of these were involved in an annual average of 275 decisions on procedural questions. To come down to more recent times, the official judicial statistics for the last few years show that of the enormous number of procedural questions decided by the masters, less than one-thirtieth are appealed to the Judges in Chambers. Of those, more than three-fourths go no further and are never heard in Court: the other one-fourth form the residue of disputes sufficiently two-sided to be submitted to the Court of Appeal. In actual number they are less than one-half per cent of the total number of proceedings annually commenced in the High Court—surely not a cause for apprehension.

THE RULE COMMITTEE AND ITS WORK

From this review it is evident that though some of the objections to the Rule Committee's results are not entirely justified, there are valid reasons for seeking to improve its machinery, and especially to minimise the possibility of its issuing Rules whose meaning is not clear, or whose form is such that they will conflict with other portions of the Code, or prove to be impractical in actual operation. To effect this object, practitioners and others have put forward many suggestions, from which a few selections may be of interest. They are addressed either to changes in the constitution of the Committee or to improvements in its methods of work.

As to the former, the point of attack has always been that judges are either too busy or too far removed from the details of office work and practice to draft rules carefully, or even to know what effects will follow a rule they have taken pains to draft. Parliament acknowledged the force of this contention by adding to the Committee a solicitor and two barristers in 1894 and a second solicitor in 1909. It is still felt, however, that those who are most intimate with the details of practice are unrepresented. The Masters of the Supreme Court are, of course, the persons whose knowledge of the Rules is, by reason of their official duties, most complete, and the natural course would seem to be to place at the service of the Committee the knowledge of at least one of these important officers. The present Newfoundland Judicature Act sets up a Rule Committee of which the Registrar of the Supreme Court (being a barrister) is *ex officio* a member.<sup>1</sup> In India, the present Code of Civil Procedure makes provision for a Rule Committee to be attached to each of the six High Courts, and for a Secretary, with separate remuneration, for each such Committee.<sup>2</sup> In all the High Courts except

<sup>1</sup> In the King's Bench Division the Masters are barristers; in the Chancery Division they are solicitors.

<sup>2</sup> Edw. VII, c. 3, ss. 675-676.

Act V of 1908, s. 123 (5).

that at Calcutta, where no Committee has yet been appointed, the Registrar of the High Court has been made the Committee's Secretary. There are, therefore, precedents for admitting to the English Rule Committee in some capacity one of the Supreme Court Masters, who fulfil the same functions as the Registrars in the Courts named. In his testimony before the Royal Commission on Delay in the King's Bench Division, Master Chitty made a strong argument for adding one of the Masters to the Committee,<sup>1</sup> but the suggestion was not embodied in the Commission's Report.

It is recognised, however, that either a Master or some other officer could act as technical adviser to the Committee without actually being a member of it, and this form of alteration in the personnel of the Committee seems to meet with more support than the other. In reply to Master Chitty, Mr. Charles Henry Morton, of Liverpool, a member of the Royal Commission and also one of the present solicitor members of the Rule Committee, said:—

"There is a feeling that the High Court Rule Committee ought not to have Masters there. I know there is such a feeling, but I do not quite know the reason. Would not your suggestion be given effect to if there was a secretary or official in the nature of a secretary, a skilled man who was made a standing secretary to the Committee—whose duty it should be to receive suggestions from the Masters and practitioners and regularly to bring those suggestions before the High Court Rule Committee for consideration?"

In that form the proposal to aid the Committee by some sort of expert assistance has been made more than once. As early as 1890, Mr. Snow, in one of the letters he wrote to the judges to disturb their peace of mind about the R.S.C., suggested that they could avoid the technical difficulties of rule-making by appointing some official, either as permanent adviser or secretary, who not only could keep

<sup>1</sup> Parl. Pap., 1913, Cd. 6762, Minutes of Evidence, Vol. 1, p. 29.

the revision of the Rules up to date, but would receive suggestions and complaints from the public and from the profession, and formulate them before submission to the Committee, so that only the question of principle need be argued, not that of form. "Clerk of the Rules," he suggested, might be an appropriate title for such an officer.<sup>1</sup> Ten years ago the report of a similar suggestion was reproduced in the following item in the *Solicitors' Journal*.<sup>2</sup>

"The President of the Liverpool Law Society (Mr. F. Marton Hull), in his address at the annual meeting of the society, threw out a suggestion which it is hoped will not be lost sight of. He proposed the appointment as assistant-secretaries to the Rule Committee of a practising barrister and a practising solicitor, to whom suggestions could from time to time be made upon rules and orders, so that due consideration could be given to any proposals before they are brought before the Rule Committee. The idea appears to be an excellent one. . . ."

Owing to the coincidence that the present Permanent Secretary to the Lord Chancellor,<sup>3</sup> who has acted as Secretary to the Rule Committee for over 30 years, has special professional qualifications which have enabled him to take a most active and invaluable part in the Rule Committee's work, there has been no reason up to the present to regard these suggestions as touching upon a pressing need. But when the time comes for him to resign the duties of his office, the whole subject will be opened for discussion, and some definite policy adopted which will probably extend to the County Courts Rule Committee as well.

A rather more elaborate arrangement is that suggested by Mr. Francis A. Stringer, the head of one of the departments in the Central Office, and one of the present editors of the *White Book*. In an address delivered before the Solicitors' Managing Clerks' Association in 1902,<sup>4</sup> he pointed

<sup>1</sup> 25 *Law Journal*, 268 (May 3, 1890).

<sup>2</sup> 49 *Solicitors' Journal*, 77 (December 3, 1904).

<sup>3</sup> Sir Kenneth Muir Mackenzie, G.C.B., K.C.

<sup>4</sup> Reported in 46 *Solicitors' Journal*, 412 (April 12, 1902).

out that the Rules of the Supreme Court contain Rules of two distinct types—those in which principles of procedure are embodied, and those which are mere practical directions for giving effect to those principles. He proposed that the Rule Committee of Judges should confine its attention to the Rules embodying principle: as to the Rules of practical direction, he would have them drawn or altered by a body subordinate to the Rule Committee—a body composed of masters, registrars, solicitors' managing clerks, and others, whose duly work consisted in following the practical directions in the Rules. "Actual knowledge of procedure should be the one essential qualification" in making up this subordinate board (to quote from an article on the same subject published by Mr. Stringer in 1899<sup>1</sup>), "and not necessarily professional qualification." Such a board would be in close touch with the actually practising elements of all branches of the profession, and could frame satisfactory rules, either of its own motion or upon the request of the Rule Committee, to be approved by the Committee before they were issued.

One suggestion dealing solely with the methods and not at all with the composition of the Committee is that there should be some fixed plan for periodic revision of the entire Code of Rules. The Irish Rules, first issued in 1877, were revised in 1891, and again in 1905; the Ontario Rules, issued in 1881, were revised in 1888, then again in 1897, and once more in 1913; the English County Court Rules were revised in 1875, 1886, 1889, and 1903, and there is now a fresh revision under way.<sup>2</sup> So also, it is argued, the English Supreme Court Rules ought to be carefully edited, and all redundancies eliminated, at recurrent periods. Certainly the present Code, cumbered by the accretions of

<sup>1</sup> 143 *Solicitors' Journal*, 363 (April 1, 1899).

<sup>2</sup> Not to mention three revisions prior to the Judicature Acts: 1851, 1856, 1868.

30 years of amendment, is badly in need of revision; that was recognised as far back as 1894, when Lord Herschell had a revision put in hand, which, though completed two years later, was never accepted by the Rule Committee.

Another possibility, for making easier the authoritative interpretation of passages in the Rules, is that the Rule Committee should have some share in deciding appeals taken from interpretations put upon Rules in Chambers. Some time ago, before the present arrangement of a Judge in Chambers was devised, there was a demand for a special Practice Court, or at least for the regular allocation of practice appeals to the list of one particular judge, who should be expert in the subject.<sup>1</sup> The creation of the Judge in Chambers largely satisfied that demand, without running counter to the modern distaste for separate Courts of special jurisdiction. But there is still the difficulty that the Judge in Chambers changes from month to month, and often from week to week; also that his decisions are not reported, and are, therefore, not available as precedents; so that there is no certainty of uniformity in his decisions. Appeals may be taken to him from the Masters repeatedly on the same point, and each time he will consider the point *de novo*, except so far as he chooses to be guided by hints as to what other judges have decided in Chambers. Parties may and often do, with his leave, appeal from him to the Court of Appeal, and there, of course, the reported decisions give some indication of how the Court will decide. But it is hard for a litigant to understand why he should have to pay the costs of having the Court of Appeal interpret rules apparently made by the judges for their own guidance.

To remedy this, the suggestion is that the Judge in Chambers might, under the power of the Court to order special references, order practice questions of first impression to be referred specially to the Rule Committee, for them to report.

<sup>1</sup> See article in 38 *Solicitors' Journal*, 19 (November 11, 1893).

whether or not the rule in question, as they understand it, applies to the case in point. This would require some such special assistance for the Rule Committee as has been mentioned in the preceding pages. Such decisions, if reported, might well be considered binding interpretations of the Rules, especially in view of the fact that the Rule Committee have, over a score of times since 1883, passed Rules intended to counteract judicial decisions in which not only the Court of Appeal, but even the House of Lords have sought by construction to limit or restrict the operation of particular Rules.<sup>1</sup>

In conclusion, it may not be supererogation to point to the development of English civil procedure since 1875 as the result of careful and intelligent study by some of the best minds of the English Bench and Bar. The close association of the rule-making body with the Lord Chancellorship has been a factor of great potency in keeping its work up to a standard befitting the dignity of that office, but even apart from that influence, the Rule Committee has, with few breaks since it was established, uniformly benefited by the services of the most able lawyers in England. Starting its career under the auspices of two such giants as Lord Selborne and Lord Cairns, careful not to throw aside too much of the procedure with which older practitioners were familiar, but constantly changing and developing the Rules entrusted to its care, it has brought civil procedure to a point where the following words, written of it by Lord Bowen in 1887 and still true to-day, are not a whit too high in its praise<sup>2</sup> :—

<sup>1</sup> See O. 3, R. 6 (F); O. 11, R. 1 (A); O. 16, R. 1; O. 16, R. 8; O. 16, R. 54 (A); O. 31, R. 29; O. 48 (A), R. 7; O. 65, R. 6 (A), etc.

<sup>2</sup> The passage is from an essay on the Administration of the Law, in a jubilee symposium entitled *The Reign of Queen Victoria*, Vol. 1, p. 309 (London, 1887). It is quoted in Dicey, *Law and Public Opinion*, p. 207 (London, 1905), with the following comment: "Any critic who dispassionately weighs these sentences, notes their full meaning, and remembers that they are even more true in 1905 than in 1887, will partially understand the immensity of the achievement performed by Bentham and his school in the amendment of procedure—that is, in giving reality to the legal rights of individuals."

"A complete body of rules—which possess the great merit of elasticity, and which (subject to the veto of Parliament) is altered from time to time by the judges to meet defects as they appear—governs the procedure of the Supreme Court and all its branches. In every cause, whatever its character, every possible relief can be given with or without pleadings, with or without a formal trial, with or without discovery of documents and interrogatories, as the nature of the case prescribes—upon oral evidence or affidavits, as is most convenient. Every amendment can be made at all times and all stages in any record, pleading, or proceeding, that is requisite for the purpose of deciding the real matter in controversy. It may be asserted without fear of contradiction that it is not *possible* in the year 1887 for an honest litigant in Her Majesty's Supreme Court to be defeated by any mere technicality, any slip, any mistaken step in his litigation. The expenses of the law are still too heavy, and have not diminished *pari passu* with other abuses. But law has ceased to be a scientific game that may be won or lost by playing some particular move."

This is, as Professor Dicey remarks, a masterly picture of the actual administration of the law drawn by one of the ablest and most enlightened of the English judges, and it leaves no room for doubt upon the merits and success of the English rule-making authority.

SAMUEL ROSENBAUM.

## II.—TRIAL BY COURT-MARTIAL.

**N**O civilian within the United Kingdom is prepared to question any steps which may be found necessary or expedient to be taken by Parliament, either for the protection of the realm or for the furtherance of the war. All loyal subjects are only too anxious that for both these purposes the Government should be armed with the fullest and most stringent powers possible. It was in this spirit that the

\* Defence of the Realm Consolidation Act 1914, which received the Royal Assent on November 27th last, passed through the House of Commons without any discussion whatever upon the most serious change in the law conceivable. It was otherwise, however, in the House of Lords. Here the Bill met with powerful opposition and mordant criticism.

The spirit of loyalty was just as strong, but it was not displayed by mere dumb acquiescence. It was at once realised by legal Members on both sides of the House, that certain of the powers conferred upon the Government were in the present circumstances neither necessary nor expedient, and were fraught with consequences of the utmost danger to the liberty of the subject and the law of the land.

The Bill, argued Lord Loreburn,<sup>1</sup> placed at the option of the Executive the power to deny to any British subject, when they thought fit, the right, which he now has, to have the trial for his life before an ordinary tribunal. By this Bill, the life of a British subject might be placed at the mercy of a military court-martial, even though the Court of Assize might be sitting within fifty yards. If it could be shown that the Courts of law were not available, or that they were not deserving of confidence, that was another matter, but this power ought not to be given when these Courts were available, and quite as able to do justice as at any period during the last hundred years. Equally emphatic was Lord Halsbury :—

"I see no necessity," he declared, "for getting rid of the fabric of personal liberty that has been built up for many generations. Although there are things which should not necessarily be insisted upon in time of war, it seems to me that this wholesale sweeping away of them is greatly to be deprecated. I hesitate very much to surrender all the liberties and protections which have been built up, as I say, for

many generations, just because at this particular time there are some things that you may wish to do more quickly than at any other time. I quite agree that the jurisdiction which an officer has over his own soldiers is such that we ought not to interfere with it, and, therefore, I should certainly agree to that extent to the giving of this jurisdiction, at the same time reserving the right of any civilian who is not bound by the military oath, to claim the right to be tried by a judge and jury. I believe a judge and jury would be perfectly able to do justice in those cases, and I do not think that the liberty of the subject is so trifling a matter that it can be swept away in a moment, because some of us are in a panic."

"I am not aware," said Viscount Bryce, one of our greatest living constitutional lawyers, "that there has ever been any precedent for such a proposal. . . . If it was a case of invasion or of civil war, then, of course, the Courts would not be available; but while the Courts are available, surely some further reason should be given to us than has been given for such an extraordinary departure as this from historic precedent. . . . I need not say that we are all heartily and entirely with the Government in desiring to give the amplest power for the arrest and detention of offenders, and we all agree that no crime could be worse than this crime of aiding the enemy if committed by a British subject. The only question is, whether the British subject is not entitled, as he always has been in times past, to have the constitutional protection of being tried by a Civil Court when there is a Civil Court there to try him."

Lord Parmoor spoke to the same effect, arguing that the question at issue was the mode of procedure :—

"I do not believe," he said, "there is any precedent for taking away the rights of a British subject as regards ordinary trial by a jury directed by a skilled judge. I do not wish to throw any aspersion on Courts-martial. The difference between the two bodies is that Courts-martial have neither the procedure nor the experience that our ordinary Courts have. They have not, in fact, the safeguards that we have built up in the Civil Courts, to protect an innocent man who may be wrongly charged."

The abrogation of the right of a British subject to be tried by a jury was, Lord Weardale vehemently declared, a "monstrous thing."

After the Bill had been read a second time, Lord Loreburn moved the following amendment :—

" Any British subject who has not accepted military or naval employment shall have the right, if he demands it, to be tried by the ordinary Courts of law for any offence punishable under or by virtue of this Act if such Courts are available, and all such Courts shall have jurisdiction to try any such offences, in accordance with regulations to be made from time to time by Order in Council."

Upon the statement of the Lord Chancellor, that the Bill must be passed as it stood or dropped, and in view of his undertaking that until the House reassembled and could re-consider the matter no one should be executed in pursuance of a sentence by a Court martial under the provisions of the Bill, Lord Loreburn withdrew his amendment. Lord Haldane stated that in the meantime it was found desirable to inflict the death sentence, there would be a trial for high treason.

To these criticisms no effective reply was or indeed could be made. Ministers, of course, pleaded their good intentions. The Marquess of Crewe endeavoured to console the dissentients by expressing his faith in Courts-martial, and reminding the House that an appeal to the Home Secretary to exercise the prerogative of mercy would still remain open to the accused. "I do not believe," he said, "that any military tribunal safe-guarded . . . by the connection between the War Department and Parliament, which is an exceedingly close one, could be, even if it desired to be, unjust in this matter of trying a civilian—that is to say, that no hurried decision could be taken by which a British subject would be tried, perhaps not by a public trial, and taken out and hanged or shot, without having an opportunity of Appeal."

Upon reflection the Marquess would, I feel sure, be the first to admit that a Court-martial, of all tribunals, is far from attaining infallibility. As to his second point, no appeal from its decision is provided under the Act, and if the executive officers of the Court carried out its decision in due course, the accused would be executed and buried long before the Home Office had investigated the case. On this point we are not left to an unaided imagination.

After the declaration of Martial law in Ireland, in 1798, Wolfe Tone, having returned to Ireland in the military service of France, was captured, tried by Court-martial and sentenced to be hanged. His father immediately applied to the Court of King's Bench in Dublin for a writ of *habeas corpus*. As soon as the Court opened on the day fixed for Tone's execution, Curran entered, leading the aged father, who produced his affidavit stating that his son had been brought before a bench of officers calling itself a Court-martial and sentenced to death?

"I do not pretend," said Curran, "that Mr. Tone is not guilty of the charge of which he is accused. I presume the officers were honourable men. But it is stated in this affidavit as a solemn fact that Mr. Tone had no Commission under His Majesty, and therefore no Courts-martial could have cognizance of any crime imputed to him whilst the Court of King's Bench sat in the capacity of the Great Criminal Court of the land. In time when war was raging, when man was opposed to man in the field, Courts martial might be endured, but every law authority is with me, whilst I stand upon this sacred and immutable principle of the Constitution, that Martial law and Civil law are incompatible, and the former must cease with the existence of the latter. This is not, however, the time for arguing the momentous question. My client must appear in this Court. He is cast for death this very day. He may be ordered for execution whilst I address you. I call on the Court to support the law and move for a *habeas corpus* to be directed to the Provost Marshal of the barracks of Dublin and Major Sandys, to bring up the body of Tone."

"Chief Justice (Lord Kilwarden): Have a writ instantly prepared."

"Curran: My client may die whilst the writ is preparing."

"Chief Justice: Mr. Sheriff, proceed to the barracks and acquaint the Provost-Marshal that a Writ is preparing to suspend Mr. Tone's execution, and see that he is not executed."

"The Court awaited in a state of the utmost agitation and suspense the return of the Sheriff, who speedily appeared and said: 'My Lord, I have been to the barracks in pursuance of your order. The Provost-Marshal says he must obey Major Sandys. Major Sandys says he must obey Lord Cornwallis. Mr. Curran announced at the same time that Mr. Tone, the father, had just returned after serving the *habeas corpus*, and that General Craig would not obey,' when The Chief Justice exclaimed, 'Mr. Sheriff, take the body of Tone into custody; take the Provost Marshal and Major Sandys into custody, and show the order of the Court to General Craig.'"

The Sheriff departed on his mission only to find Wolfe Tone dying. Unable to bear the ignominy of an execution at the hands of the hangman he had cut his throat.<sup>1</sup>

What but for this tragic incident would have been the result of this conflict between the civil court and the military tribunal which had sentenced a man to death over whom it had no jurisdiction, it is impossible to determine. The case illustrates the attitude of military officers. "The Provost-Marshal says he must obey Major Sandys. Major Sandys says he must obey Lord Cornwallis," and "General Craig would not obey" the writ. Does the Marquess of Crewe really think that an abortive appeal to the Home Secretary is equivalent to a trial by a judge and jury with a right of appeal to the Court of Criminal Appeal? Is it not apparent that a military officer entrusted with the execution of a prisoner would carry out his orders at the appointed hour in spite of any appeal lodged by the prisoner with the Home Office?

<sup>1</sup> Cited by Mr. James M. Lowry, in his *Martial Law within the Realm of England*. London: John Lane, Ltd., 1914.

In order to deal effectively with the principles involved in the Defence of the Realm (Consolidation) Act and the Regulations thereto, it is necessary to set out the substance more or less fully. The main question at issue to be discussed is the mode of trial and punishment, although some minor criticisms will be offered upon other points.

By sub-sec. 1 of sec. 1 of the Act,<sup>1</sup> His Majesty in Council is empowered—

"during the continuance of the present war to issue regulations for securing the public safety and the defence of the nation, and as to the powers and duties for that purpose of the Admiralty and Army Council and of members of His Majesty's forces and other persons acting in his behalf; and may by such regulations authorise trial by Courts-martial or in the case of minor offences by Courts of Summary Jurisdiction, and punishment of persons committing offences against the regulations, and in particular any of the provisions of such regulations designed—

(a) To prevent persons communicating with the enemy or obtaining information for that purpose, or any purpose calculated to jeopardise the success of the operations of any of His Majesty's forces or the forces of his allies, or to assist the enemy, or

(b) To secure the safety of His Majesty's forces and ships, and the safety of any means of communication and of railways, forts and harbours; or

(c) To prevent the spread of false reports or reports likely to cause disaffection to His Majesty, or to interfere with the success of His Majesty's forces by land or sea, or to prejudice His Majesty's relations with foreign powers; or

(d) To secure the navigation of vessels in accordance with directions given by or under the authority of the Admiralty; or

(e) Otherwise to prevent assistance being given to the enemy or the successful prosecution of the War being endangered."

<sup>1</sup> 5 Geo. V, c. 8. See *Manual of Emergency Legislation*, comprising all the Acts of Parliament, Proclamations, Orders, etc., and Supplement No. 2, passed and made in consequence of the War. Edited by Alexander Pulling, C.B., London: Darling & Son, Ltd. 1914.

In pursuance of this sec., Regulations were issued by Order in Council of November 28th 1914.

By sub-sec. 3 of sec. 1 of the Act it is lawful for the Admiralty or Army Council to acquire the output of any factory or workshop where munitions of war are manufactured, and the possession of such factory or workshop or plant thereof as may be required.

Regulations 7 and 8 deal with these powers, and the procedure to be adopted in case the compensation cannot be agreed between the parties.

Sub-secs. 4 and 5 of sec. 1 contain the provisions to which in our opinion every loyal subject in the realm may, in the light of our present knowledge, justly take serious objection:—

"(4) For the purpose of the trial of a person for an offence under the regulations by Court martial and the punishment thereof, the person may be proceeded against and dealt with as if he were a person subject to military law, and had on active service committed an offence under sec. 5 of the Army Act: Provided that where it is proved that the offence is committed with the intention of assisting the enemy a person convicted of such an offence by a Court martial shall be liable to suffer death:

"(5) For the purpose of the trial of a person for an offence under the regulations by a Court of Summary Jurisdiction and the punishment thereof, the offence shall be deemed to have been committed either at the place in which the same actually was committed or in any place in which the offender may be, and the maximum penalty which may be inflicted shall be imprisonment with or without hard labour for a term of six months or a fine of one hundred pounds, or both such imprisonment and fine."

It is to be noted that by this section the right of the accused under sec. 17 of the Summary Act 1879 to a jury is expressly withdrawn. An appeal lies in England to a Court of Quarter Sessions; in Scotland to the High Court of Justiciary, and in Ireland to a Court of Quarter Sessions.

Such an appeal, however, could only be brought on a question of law, and so a jury, to review questions of fact, could not be granted.

In addition to the penalties prescribed in these sections by sub-sec. 6 of sec. 1, regulations may be issued authorising Courts-martial and Courts of Summary Jurisdiction "to order the forfeiture of any goods in respect of which an offence against the regulations has been committed." Regulations 57 and 58 give this authorisation.

It is essential to ascertain what offences are triable by Courts-martial and what by Courts of Summary Jurisdiction. Neither in the Act nor in the Regulations is there any definition of either of these classes of offences. Sec. 1 of the Act, it will have been observed, provides that His Majesty in Council may, by regulations, authorise the trial by Courts-martial, or, in the case of minor offences, by Courts of Summary Jurisdiction, but as to what constitutes a minor offence the Act is silent. The mystery is solved by Regulation 56:—

"A person alleged to be guilty of an offence against these regulations may be tried either by a Court-martial or before a Court of Summary Jurisdiction: Provided that, in the case of any offence against these regulations declared to be a summary offence, the alleged offender shall not be liable to be tried otherwise than before a Court of Summary Jurisdiction. When a person is alleged to be guilty of an offence against these regulations (other than offence declared by these regulations to be a summary offence) *the case shall be referred to the competent naval or military authority, who shall investigate the case and determine whether it shall be tried by Court-martial or summarily; or shall not be proceeded with, and if the alleged offender is in custody he shall, if he is to be tried by Court-martial, be kept in or handed over to military custody, and if he is to be tried summarily, be handed over to or kept in Civil custody.*"

So far no offences have been declared by these regulations to be summary offences, and whether any offences are to be

tried by Courts of Summary Jurisdiction depends entirely upon the discretion of the competent naval or military authority to whom the investigation of the case is entrusted. Surely major and minor offences should have been defined in the Act as is suggested in sec. 1. The determination of this distinction by the naval or military authority is the last question which should be left to the discretion of any naval or military authority however competent. The provision for the trial of even minor offences by a civil tribunal, as contemplated by the Act, is here shown to be quite illusory. If Ahlers' offence had been committed after the Act came into force, is there any doubt that he would have been tried by Court-martial, convicted and executed? As it was, he was tried before a judge of the High Court and a jury, and the prosecution was conducted by the Solicitor-General. He was convicted, yet his conviction was quashed by the unanimous judgment of the five judges composing the Court of Criminal Appeal, on the ground that the prisoner had no criminal intent. Even with a civil judge and jury we see how a grave injustice was narrowly avoided. We also see the necessity for an appeal to a more impartial tribunal.

By subs. 2 of sec. 1 of the Act the "Regulations may provide for the suspension of any restrictions on the acquisition or user of land, or the exercise of the power of making bye-laws, or any other powers under the Defence Acts 1842 to 1875 or the Military Lands Acts 1891 to 1903, and any such regulations or any orders made thereunder affecting the pilotage of vessels, may supersede any enactment, order, charter, bye-law, regulation or provision as to pilotage."

Regulations 2 to 6 inclusive deal with the powers conferred upon competent naval and military authorities to take possession of land, buildings, works, etc., and to make such use of them as they think fit, to the extent of any destruction of private property or interference with private rights of property; the stoppage of public roads and the

removal of vehicles, etc., and the destruction of warlike stores, if incapable of removal.

By Regulations 9 to 26 inclusive, the following powers are conferred upon the naval and military authorities. Powers are granted to them to clear areas of inhabitants; to close licensed premises; to require extinguishment of lights (this is also granted to the Home Secretary); to require inhabitants to remain indoors; to remove suspected persons from specified areas; to require a census of all goods, animals and other commodities; to order local authorities to propose schemes for destruction of harbour works, etc., to prohibit the obtaining and communication of naval and military information, photographing naval and military works, tampering with telegraphing or telephonic apparatus, etc., the possession of carrier pigeons, possession of wireless telegraphic apparatus, embarkation of persons suspected of communicating with the enemy, postal communication with the enemy, possession of signalling apparatus, and use of fireworks.

Regulation 27 deals with the circulation of reports—

"No person shall by word of mouth or in writing or in any newspaper, periodical, book, circular or other printed publication, spread false reports or make false statements or reports or statements likely to cause disaffection to His Majesty, or to interfere with the means of His Majesty's forces by land or sea, or to prejudice His Majesty's relations with foreign powers, or to spread reports or make statements likely to prejudice the recruiting, training, discipline, or administration of any of His Majesty's forces, and if any person contravenes this provision he shall be guilty of an offence against these regulations."

Regulations 28 to 50 inclusive contain provisions relating to the safety of railways, bridges, and military works; the sale of fire-arms and explosives; the compliance with rules of navigation in harbours and dangerous areas, and the pilotage of vessels; the supply of intoxicants to the troops; the unauthorised use of naval and military uniforms; incite-

ments to mutiny; obstruction of officers in performance of their duties; falsification of reports; forging of naval and military documents and personation; use of false passports; refusal to comply with orders; aiding and abetting persons acting in contravention of the regulations; failure to disclose such contraventions and any assistance to the enemy.

The widest powers of search and arrest are conferred upon the naval and military authorities by Regulations 51—55 inclusive. Assuming that a state of peace within the realm is in fact in existence, it was undoubtedly necessary to confer these powers and to create these offences. Many of the offences could no doubt be tried under the Statute of Treasons, but in the case of others no penalty could be imposed when they were committed by civilians or neutrals. Moreover, in many cases of comparatively minor importance, capital punishment, the only penalty on conviction for high treason, was too severe. So far, offences against the Act have been tried by Courts of Summary Jurisdiction. Lody, as an enemy-subject, was properly tried by Court-martial. Under the Army Act, Military Courts can only impose the death sentence for war crimes. "The same offence," said Lord Haldane, in giving his reasons for trial by Courts-martial, "if committed by a British subject or a neutral, could not under the existing Acts be punished by death upon trial by Court-martial." But the same offence can be punished by death upon a prosecution in the Civil Courts under the Statute of Edward III, for high treason. Lord Haldane's argument that the procedure by Court-martial is likely to have a more deterrent effect than trial by a civil tribunal, does not appear to possess any substance. A British subject, to take his own illustration, caught red-handed in the act of laying mines off the English coast for the destruction of English vessels, would receive short shrift from a British jury, and every Britisher knows what his fate in these circumstances would be.

Perhaps the most amazing provision of this amazing Statute is sub-sec. 3 of sec. 1, by which the status of a civilian is changed by the stroke of a pen. A person accused of any offence under the Act "may be proceeded against and dealt with as if he were a person subject to Military law, and had on active service committed an offence under sec. 5 of the Army Act."<sup>1</sup> He is to be "treated," says Regulation 57, "as if he belonged to the unit in whose charge he may be."

By this provision every British subject has become subject, not to Martial law as understood in times of emergency, to which no one can object, but to Military law as administered by Courts-martial, as if he were a soldier on active service, and although in reality a state of peace is in existence. Even when this country was daily expecting invasion at the hands of Napoleon, and the coast was full of spies, no one ventured to propose such an artificial inversion of status.

By Regulation 57, a Court-martial may, for any offence against the regulations, impose the penalty of penal servitude for life, and if committed with intent to assist the enemy, the extreme penalty of capital punishment. In respect of offences against Regulations, 12 as to lights; 21, possession of carrier pigeons; 22, possession of wireless apparatus, etc.; 25, possession of signalling apparatus; 27, circulation of reports; 28, trespass on railways, etc.; 35, possession of celluloid and cinematograph films; 53, refusal to answer questions; 60, tampering with notices; and 61, improper use of permits, no sentence exceeding six months' imprisonment with hard labour may be imposed, provided the accused can prove that he acted without any intention of assisting the enemy, or, in the case of Regulation 27, of causing disaffection, etc.

<sup>1</sup> Offences under sec. 5 are punishable with penal servitude, or any less punishment.

The Court-martial to try offences under the regulations must be either a General or a District Court-martial, "convened by an officer authorised to convene such description of Court-martial within the limits of whose command the offender may for the time being be." A District Court-martial may not impose a sentence of penal servitude. By paragraph 3 (B) of Army Order 310 of 1914, unless the charge is "of such a serious nature as to make it desirable that a sentence in excess of two years' imprisonment, with or without hard labour, should be awarded," such charge must be tried by a District Court-martial.

By the Rules of Procedure to the Army (Council) Act 1913, in the case of a General Court-martial, five at least of the members must not be below the rank of captain, whilst the president should, if possible, be a general officer or colonel. It alone can try an officer, and it alone can award the punishments of penal servitude and death. In the case of a District Court-martial any officer who has held a commission for two years may be a member. The Court cannot inflict any punishment exceeding two years' imprisonment. In both these Courts counsel may appear on behalf of the accused, to examine, cross-examine, and re-examine witnesses, to make an objection or statement, to address the Court, to put in any plea, and to inspect the proceedings, and generally to act in the place of the person for whom he appears. He is bound by the Rules of Procedure and by the rules of the Civil Courts in England relating to these matters and to the duties of counsel.

In the composition of a Court-martial constituted to try a civilian, a difficulty which does not appear to have been contemplated by the framers of the Act arises. It is a fundamental rule that the members of a Court-martial for the trial of an officer must be of equal if not superior rank to that officer. Since the civilian defendant has no status which can be compared with that of a military officer,

officer, what is to be the composition of his judges? The old doctrine borrowed by the military power from the Common law, that a man shall be judged by his peers, would appear in these circumstances to have broken down.

This substitution of military for civil Courts constitutes a breach in the law of the land which has never previously been sanctioned by Parliament. It is an entirely new departure from constitutional practice, and can only be justified by military necessity. The fact that a state of war exists is not *per se* a sufficient proof of military necessity. The real question is, whether the Courts are open and the course of justice uninterrupted. If such is the case in the United Kingdom, or in any part of it, then the United Kingdom, or such part, is in a state equivalent to a state of peace. As Sir Edward Coke said, "The time of peace is when the Courts are open. For, when they are, you may have a commission of oyer and terminer, and when the Common law can determine a thing the Martial law ought not." Elsewhere he said, "When the Courts are open Martial law cannot be executed." To the same effect is Sir Matthew Hale, "The exercise of Martial law, whereby any person shall lose his life, or members, or liberty, may not be permitted in time of peace, when the King's Courts are open." Both these judges, observed Chief Justice Cockburn, were speaking of Martial law, not with reference to its exercise for the suppression of a rebellion, but as a rude substitute for the law of the land, when in time of war justice cannot be administered by the ordinary tribunals.

It is indeed true that the Judicial Committee of the Privy Council decided in *re parte D. F. Marais*,<sup>1</sup> that the absence of visible disorder and the continued sitting of the Courts were not conclusive evidence of a state of peace. This decision, in Sir Frederick Pollock's opinion, is correct, but

"not binding on any English Court, and probably not binding on the Judicial Committee itself."<sup>1</sup> Whether a state of war exists at a given time and place is a question of fact, which according to Coke could only be determined by the Court and was not a question for the jury.<sup>2</sup> But, as Sir Frederick points out, under modern conditions of warfare and with the present means of communication, there may be a state of war at any place where aid and comfort can be effectually given to the enemy. "In many places there may be outwardly peace, and yet modern means of communication may admit of important aid being conveyed to the enemy in the shape of information, supplies, and personal adherents. In this manner the effective radius of a state of war has been multiplied tenfold, or more. By recognising this fact we do not alter the law, but apply it to facts as they exist; nor do we disparage the wisdom of our predecessors who declared their opinion of the law in a form appropriate to the facts as known to them." Thus, by applying the spirit and not the strict letter of the law, the mediæval and modern theories may be reconciled. So that, although we can no longer say with Coke that "when the Courts of Justice be open, and the judges and ministers of the same can by law protect men from wrong and violence and distribute justice to all, is a time of peace," we can say that when the Courts are open and the judges free to administer the law without let or hindrance, although a state of war exists in fact within the jurisdiction, offences committed by civilians against the law of the land, or against any regulations issued by the Crown, should be tried and punished by a judge and jury in the civil Courts.

Under modern conditions it is difficult to determine whether a state of war exists at the present time within the realm or not. Subject as this country is to attacks by sea or air at any moment, a state of war may be said

<sup>1</sup> *Law Quarterly Review*, 18, 157.

<sup>2</sup> *Co. Lit.* 249*b*.

to exist throughout the realm and indeed throughout the empire. But this is not the sense in which Coke and the mediæval lawyers understood the phrase. In former days, armies were opposed to each other within narrow limits, and within such limits obviously the administration of the law by civil tribunals became a physical impossibility. The principle they intended to express was, that where it was possible for the civil Courts to administer justice, they should be allowed to do so. This principle is equally applicable to-day in the United Kingdom. The fact that Scarborough is shelled by the German fleet or Sheerness bombarded by a German aeroplane, or that Ahlers assisted German reservists to return to their fatherland, may constitute a state of war within the realm, but it is not such a state of war contemplated by the Common law which renders it impossible for the civil Courts to sit.

That the civil Courts are able to sit is, however, assumed by the powers of the Act. By Regulation 1 of the General Regulations, "ordinary civil offences will be dealt with by the civil tribunals in the ordinary course of law." Moreover, by the Act itself, minor offences against the Act *may* be tried by Courts of Summary Jurisdiction. If Courts of Summary Jurisdiction are able to sit, presumably the High Courts are also able to sit. One may therefore be permitted to ask why graver offences against the Act may not be tried by the High Courts which are sitting, and which are presumably more fitted for the trial of offences than military tribunals. No sound reason has yet been adduced. It might be argued that in some circumstances it is of vital importance to punish offences *instante* in order to deter others and to maintain order. The answer to this is, that under the Common law such punishment may be inflicted by any naval or military officer responsible for the safety of the realm.

As Sir Frederick Pollock has so admirably and lucidly explained, under the necessity of war, acts which in time of

peace are illegal become lawful. They "are not a kind of splendid offence, but are (in the words of Justice Kingsmill) 'justifiable and lawful for the maintenance of the Commonwealth.' " The old doctrine that necessary acts in time of war were in the first instance illegal and could only be condoned by a subsequent Act of Indemnity, Sir Frederick contends, is to "impute gratuitous folly to the Common law which cannot be so perverse as to require a man in an office of trust to choose between breaking the law and being an incompetent officer and a bad citizen."

Under the Common law, therefore, any person, military or civil, during a state of war, acting reasonably and in good faith may, and is in duty bound to, interfere with rights of property and with personal liberty, provided such interference is necessary for "the maintenance of the Commonwealth." But the person so acting will act at his peril. His action is liable to be reviewed in the civil Courts. He is liable at the suit of the person damaged to civil damages or criminal penalties. This liability exercises a wholesome restraint upon the overzealous, whether military or civilian. But by the Defence of the Realm Act, a military person acting under its provisions can no longer be challenged. No doubt military persons called upon to act in cases of emergency, with the choice of breaking the municipal law or disobeying orders, feel themselves badly used.

"The inconvenience," wrote Stephen, "of being subject to two jurisdictions, the sympathies of which are not unlikely to be opposed to each other, is an inevitable consequence of the double necessity of preserving on the one hand, the supremacy of the law, and on the other the discipline of the army."<sup>1</sup>

The principle of the Common law was quite simple. If they acted in good faith, with reasonable and probable cause for the safety of the Realm, they were immune. If they did

<sup>1</sup> *Hist. Crim. Law of England*, I, 296.

not so act, they were liable to be punished like every other citizen. Even a proclamation by Order in Council declaring a state of war was no defence. It was only evidence of a state of war, and of a reasonable and probable cause of action. Indeed it is doubtful whether the Crown still enjoys the right of making such a declaration within the realm.

Thus the Act, without in any way increasing the powers of naval and military authorities during a state of war, has abolished the Common law right of the subject to that redress to which he is entitled, provided he can prove that those authorities had acted in bad faith or without reasonable and probable cause in maintaining the defence of the realm. This subordination of the Common law to militarism is as great a blot on the Act as the substitution of Courts-martial for civil Courts in the trial of civilians. It might have been "made in Germany."

It has indeed been contended that "where war actually prevails, the ordinary Courts have no jurisdiction" over the actions of the military authorities, and that their power having been once suspended is gone for ever. The better opinion is against this extreme view. Under the Common law, both during the continuance of the war and afterwards, the civil Courts are entitled to go into the merits of such actions. In the recent case of one Dove, Lush and Atkin, J.J., refused to grant a *rule nisi* upon a writ of *habeas corpus*, but this refusal was based, not upon the ground that the Court had no jurisdiction, but upon the merits of the case. They were satisfied that the man was properly detained.

So far as such authorities were acting under the provisions of the Defence of the Realm Act, it is doubtful how far, if at all, the Courts would interfere.

Other reasons for the substitution of Courts-martial for the trial of civilians may be urged. There is the difficulty

of taking the evidence of military witnesses, where cases are deferred till the Assizes come round. In the cases to be tried under summary jurisdiction, this difficulty does not exist, and in cases fit for the High Court it could easily be surmounted by expediting the trial. It is said that secrecy is in general vital, but where such is the case, the Court has power to hear the evidence *in camera*. In disturbed districts it is urged it might be impossible to obtain an impartial jury. If the disturbance is due to civil disaffection and rebellion, I quite agree, but we are not considering such a situation.

We are considering only the possibility of trying a British subject for an offence against the Defence of the Realm Act under the present state of affairs. Suppose Mr. Keir Hardie were accused under Regulation 27 of making statements which, in the opinion of the commanding officer in the district, were "likely to prejudice the recruiting, training, discipline, or administration of His Majesty's forces," which would be the most impartial tribunal, a body of officers, "judges in their own cause," or a High Court judge and jury of average citizens? Or take the case of an editor of a great daily paper, who is accused under the same regulation of "prejudicing His Majesty's relations with foreign Powers." Is a military tribunal to determine whether references, for instance, to the conduct of Russia in Finland constitute an offence punishable with six months' imprisonment, when an Assize Court is sitting in the same street?

Suppose, in addition, that in either case the motive of assisting the enemy is alleged. Which tribunal is most likely to elicit the truth, a military Court composed of individuals with little or no experience in sifting evidence, unacquainted with the most elementary rules of evidence, and totally unfit by training for deciding such delicate questions as the imputation of intention, or a civil Court composed of trained judges, assisted by professional lawyers,

all alike saturated with the rules of evidence hammered out by their predecessors in the course of centuries, to become in their hands instruments of precision and of justice.

No reflection is here intended to be cast upon those gallant soldiers who compose Courts-martial. Courts-martial for the trial of military offences committed by military persons are, apart from the necessity of war, the right and proper tribunals. It is unfortunate that Martial law has even in the Courts been used in a loose sense. The law administered by Courts-martial is Military law, applicable to military persons and to them only. Martial law, strictly speaking, has ceased to exist. It was the law formerly enforced by the Court of the Constable and the Marshal which lapsed in the reign of Henry VIII. Martial law is used in modern parlance for the law enforced by the military or other authority during a state of war, when the law of the land is in abeyance or is insufficient to meet the emergency, and it is enforced upon all classes alike, military and civil. Its justification lies in the maxim *Salus populi suprema est lex*. It does not depend upon the royal prerogative; it does not specially appertain to military as opposed to civil authorities; and it can only be justified by necessity. No evidence of such necessity has yet been adduced.

On the 6th January a Bill to amend the Defence of the Realm (Consolidation) Act, introduced by Lord Parmoor, was read a first time in the House of Lords. Its terms are somewhat wider than Lord Loreburn's amendment :—

"No person not at the time of the alleged offence subject to military law within the meaning of the Army Act 1881 who has committed, or who is alleged to have committed, any offence which is punishable by the law of England, and is within the jurisdiction of the Criminal Courts, shall be liable to be tried for such offence under the Defence of the Realm (Consolidation) Act 1914, or any Act incorporating, amending, or repealing that Act, or any regulations thereunder."

On the following day Lord Loreburn asked the Marquess of Crewe whether the Government intended to propose an amendment to the Act, so as to enable British subjects to require a trial before the ordinary Courts when available. The Marquess having replied that such was the Government's intention, Lord Curzon intervened, with the observation that he had consulted Lord Lansdowne as leader of the Opposition, and he should not like Lord Loreburn to go away with the impression that because the Government would introduce such an amending Bill it would thereby pass into law.

There the matter rests for the moment. This is not a mere academic dispute.<sup>1</sup> It is the most serious question of constitutional law which has arisen since the settlement of this very point by the Petition of Right in 1628. The issue before the country is whether the Common Law is to be supreme, or the Army Council. By consenting to introduce an amending Bill, the Government has acknowledged its error, but in view of the attitude of the leader of the Opposition above indicated, the prospect of placing this measure on the Statute Book is not too hopeful. It is the more incumbent, therefore, upon all those who see in the supremacy of the Common law the only sure protection for personal liberty, to assist the Government in its attempt to retrieve the situation to the utmost of their power. At the present moment, the Common law lies under the iron heel of militarism, a militarism of the same genus as that which we are endeavouring to destroy on the plains of Flanders. Once let militarism gain the upper hand in her conflict with the Common law, war or no war, it will tend to grow to the same evil proportions which it has attained in Germany. Let us not allow this

<sup>1</sup> It is significant that in Austria, where executions of civilians in pursuance of sentence by courts-martial are taking place, a popular agitation has arisen protesting against such mode of trial, and demanding that civilians should be tried in the Civil Courts.

subordination of the ordinary Courts of the land to military tribunals to remain a precedent for the not distant future. The clouds of labour troubles still darken the sky, and but for the Great War, would have already burst upon us. That way lies revolution.

HUGH H. L. BELLOT.

### III.—SALES "WITHOUT RESERVE."

WHEN an auctioneer advertises a sale as being "without reserve," does he thereby bind himself to knock down the property to the highest *bona fide* bidder? It has been customary to answer that question in the affirmative by simply referring to *Warlow v. Harrison*,<sup>1</sup> but this summary solution does not seem to be wholly satisfactory.

In the first place we must observe that *Warlow v. Harrison* is not actually a decision upon the point at all. What happened in that case was that a horse advertised for sale "without reserve" was bought it by a bid made on behalf of the vendor, and the highest *bona fide* bidder thereupon sued the auctioneer for breach of contract. The declaration alleged that the defendant became the plaintiff's agent to complete the sale, and the defendant's third plea was a denial of this agency. Upon this plea the Court of Queen's Bench entered judgment for the defendant, holding that the agency could only arise upon the formation of a contract between vendor and purchaser, and that, in this case no such contract had ever existed. Upon appeal to the Exchequer Chamber the Court affirmed the judgment upon the pleadings as they stood, but expressed an opinion that upon an amendment of the pleadings the plaintiff might succeed. In the course of their judgment three of the judges

<sup>1</sup> E. & E. 295; 17 R. R. 219. Sir Frederick Pollock, however, quotes considerably from other text-book writers.

expounded the theory for which the case is cited, namely, that the auctioneer made an offer to knock the lot down to the highest bidder, and that this offer was accepted and turned into a contract by the highest *bona fide* bid being made. The other two judges, while agreeing in the conclusion, rested their opinion on the ground that the defendant professed an authority to sell without reserve which he did not in fact possess. In the result the judgment of the Court below was affirmed, but the plaintiff was given leave to amend his pleadings and proceed to a new trial, unless the parties could agree to enter a *stet processus*. This last course was the one actually adopted, and so there was then an end of the case.

Passing now to the later history of the matter, we find *dicta* expressing more or less approval of *Warlow v. Harrison* in four cases coming down as far as 1899;<sup>1</sup> but in none of these was it actually necessary to decide the point we are now discussing. On the other hand we have a considered judgment of the Court of Queen's Bench, in which the judges are at pains to point out that the opinions expressed in *Warlow v. Harrison* are not conclusive of the matter, which therefore remains an open question. In this case<sup>2</sup> the property was offered for what was called a "peremptory sale," with an intimation that further particulars might be obtained on application to the vendor's solicitor or auctioneer. No reserve price was mentioned until the bidding was in progress. The plaintiff made the highest bid, but since he fell short of the reserve the lot was withdrawn. The action was brought against the auctioneer, and the plaintiff relied on *Warlow v. Harrison*. The Court gave judgment for the defendant on the ground that he was acting merely as an agent for a principal whose existence

<sup>1</sup> *Spencer v. Harding* (L. R. [1870], 5 C. P. 561, at 563); *In re Agra and Masterman's Bank* (L. R. [1867], 2 Ch. App. 391, at 397); *Harris v. Nickerson* (L. R. [1873], 8 Q. B. 286, at 288); *Johnston v. Boyes* (L. R. [1899], 2 Ch. 75, at 77).

<sup>2</sup> *Mainprize v. Westley* [1865] 6 B. & S. 420.

was disclosed. But in the course of the argument Blackburn, J., remarked (at p. 424) :—

"The view that the auctioneer [in *Warlow v. Harrison*] made a contract, was first started by three judges of the Court of Error, and was not adopted by the other two: the judgment of the Court was not that the plaintiff should recover, but that he might amend in conformity with the opinions of the majority in order that the question might be raised: so that we have three judges of the Exchequer Chamber against three judges of this Court."

Again, in delivering the judgment of the whole Court for the defendant, he pointed out (at p. 429) :—

"We do not think, therefore, that we are precluded by this, as a judgment of a Court of Error; and, if necessary, we should be at liberty to consider the question whether, even in the case where the name of a principal is not disclosed by an auctioneer, there is a contract by the latter such as is now insisted on. My Lord and my brother Shee are of opinion that there is not . . . I myself should pause before deciding on this ground. I do not, however, wish to express dissent from the view thus expressed; and we are all of opinion that it is unnecessary to decide this point. The three judges who formed the majority in *Warlow v. Harrison* based their opinion entirely on the fact that the vendor was not disclosed, that he was a concealed principal; but in the present case the passages in the handbills . . . showed that the defendant was acting for a principal."

It would seem, therefore, that the case law on the subject does not supply us with any conclusive answer to our question. Certainly there is nothing to warrant the dogmatic assertions which appear in some text-books on the authority of *Warlow v. Harrison*. But since the date of these decisions we have had the Sale of Goods Act of 1893, in which the law is laid down in these terms (sect. 58, sub-sect. (2)) :—

"A sale by auction is complete when the auctioneer announces its completion by the fall of the hammer or in other customary manner. Until such announcement is made any bidder may retract his bid."

The remaining sub-sections provide that a bid by the owner shall be deemed fraudulent, unless he has expressly reserved his right to bid; but both this right and the right to impose a reserve price are carefully safeguarded.

Now the Sale of Goods Act is a codifying statute, and it is undisputed that in the sub-section just quoted it is merely declaring what, apart from *Warlow v. Harrison*, was the general principle regulating auction sales.<sup>1</sup> That being so, it is at least remarkable that it contains no indication whatever of there being any such exception to the general rule as was suggested by the language of three judges in that case. The Act purports to be a complete code,<sup>2</sup> and in no other instance does it leave an exceptional rule to be inferred from the doubtful principles of an earlier case instead of defining it in express terms. As a matter of fact, the Act has the reputation of being one of the best drafted of the English codes, and this reputation could hardly be sustained if its unqualified statements were always liable to be qualified by glosses from the older case law.

We may now pass to consider the course of decisions later than the Act. In *Johnston v. Boyes*,<sup>3</sup> to which reference has already been made, Cozens-Hardy, J., certainly cited *Warlow v. Harrison* as an authority for the proposition that the auctioneer who sells without reserve is bound to knock down the goods to the highest *bona fide* bidder, but upon the facts of the case before him he decided in favour of the defendant upon other grounds. Then we have

<sup>1</sup> *Payne v. Caze* ([1789], 3 T. R. 148); *Harris v. Nickerson* [L. R. 1871] 8 Q. B. 286).

<sup>2</sup> On the construction of codifying statutes in general, see *Banks of England v. Fagiano Bros.* [L. R. 1891], A. C. 107), cited and approved by the Privy Council in *Robinson v. Canadian Pacific Railway Co.* [L. R. 1892], A. C. 481); and on the Sale of Goods Act in particular, see *Wallis v. Amwill* ([1902], 2 K. B. 38).

<sup>3</sup> L. R. [1899], 2 Ch. 75. The lot here was actually knocked down to the plaintiff, who, however, was unable to pay the deposit in cash. The property being land, the Sale of Goods Act did not govern the transaction.

Another curious case of *Rainow v. Hopkins*,<sup>1</sup> in which the vendor fixed a reserve price, but the auctioneer accidentally offered the lot for sale without reserve. The lot was actually knocked down to a purchaser and then withdrawn upon discovery of the mistake. The Court held that the purchaser could have succeeded in this case if it had not been for the Statute of Frauds. The point we are considering did not therefore arise for decision, and the case only calls for notice here, owing to a remark of Kennedy, J., in delivering the judgment of the Court (at p. 326):—

"*Warlow v. Harrison* was cited to us by the plaintiff's counsel. But in that case the auctioneer never made a contract, as he refused to accept the plaintiff's bid, although it was the best genuine one, and therefore he never did effect a contract between his principal and the plaintiff."

The only other authority that remains is a Scottish case of *Fenwick v. Macdonald, Fraser & Co.*, decided in the Second Division of the Court of Session.<sup>2</sup> The particulars of sale in this case announced that the lot would be offered unreserved, but that the owner reserved the right to make one bid. The action was raised both against the auctioneer and the owner, the auctioneer having refused to accept the purchaser's bid. So far as the actual case was concerned, the construction of the advertisement adopted by the Court was sufficient to absolve both defenders, but in all the opinions passages occur which show that the decision might rest upon a broader basis. Thus, for example, Lord Young says (at p. 853):—

"I think that there is no sale until the fall of the hammer, and that until then any competitor is entitled to withdraw his bid. Of course it follows that any proprietor is entitled to withdraw the article he is selling. One party is not bound when the other is free."

It is difficult to answer this reasoning, unless we are prepared to say that in the case of a sale without reserve there

<sup>1</sup> [1901] 2 K. B. 322.

<sup>2</sup> [1904] 6 T. 550.

are really two contracts—one formed by the making of the highest bid and the second by the fall of the hammer. The former contract would then be in the nature of an option to purchase, leaving the bidder, but not the auctioneer, at liberty to withdraw. This view, however, seems to be extraordinarily far fetched, and it certainly finds no support whatever from the very clear language of the Sale of Goods Act. At the present day we can hardly be expected to override the express terms of a well-drafted code by an anomalous rule which, if it ever existed at all, rested upon the *dicta* of certain judges in *Warlow v. Harrison*.

HERBERT A. SMITH.

#### IV.—CORROBORATION IN BASTARDY CASES.

A MONG the many branches of litigation now-a-days assigned to our inferior Courts perhaps none raises more difficult issues than the administration of the Bastardy laws. On an application for a bastardy order there is usually a direct conflict of evidence, tank perjury being committed on one side or the other—not infrequently on both. The applicant is often unable to procure professional assistance, and her case is presented so imperfectly as to lead to a miscarriage of justice; while, in many instances, the putative father is placed at a disadvantage through prejudice springing from sympathy with the plight of the applicant, or he is, perhaps, hampered by some folly or indiscretion of which he has himself been guilty in the hope of escaping scandal and the stigma which almost invariably attaches to the presentation of such a complaint in an open and public Court.

Apart from these unavoidable obstacles in the way of a just and satisfactory determination, there is a further serious

difficulty arising from the very proper statutory prohibition against the making of any order unless the evidence of the mother be "corroborated in some material particular by other evidence to the satisfaction of the justices" (*Bastardy Laws Amendment Act 1872*, s. 4). As may well be supposed, this salutary provision, on occasion, involves the solution of intricate questions—questions partly of fact and partly of law. It has long been established that the required corroboration may consist of admissions made by the alleged father to or in the presence of persons other than the mother. Indeed, silence on his part, when taxed with the paternity of the child, may afford sufficient corroboration: "the magistrates," said Lord Russell of Killowen, in *Hill v. Denmark* (59 J. P. 345), "had the witnesses before them, " and could judge from their demeanour and the way the "evidence was given what was the proper inference to be deduced as to the meaning of his silence." In a later case the defendant and the child's mother (who was a maid-servant in the employ of his grandfather) had been seen out together "in the lanes" of an evening, and, after the birth, defendant had asked if the girl "was going to swear the child." This was held to be sufficient in a judgment from which, however, Wills, J., expressly dissented (*Harvey v. Anning*, 87 L. T. 687; 67 J. P. 73). Indeed, the Court may rely upon acts of undue familiarity or other circumstances that occurred some months before the time of conception (*Cole v. Manning*, 2 Q. B. D. 611; 46 L. J. M. C. 175); while the necessary corroboration may, of course, rest on payment of money for the child's maintenance, where such payment is proved by testimony other than that of the mother.

But magistrates have few authorities to guide them amidst the infinite varieties of embarrassment that arise in the determination of this issue; and, although, in a very recent case reported in the December and January numbers of the Law Reports, the judgment of a Divisional Court has

been reviewed in detail by the Court of Appeal, it will be found that many difficulties must still surround the subject of "corroboration." The Judges of the High Court and the Lords Justices alike upheld the bastardy order made by the magistrates (*Mash v. Dailey*, L. R. [1914], K. B., 1; 3 K. B. 1226), but, as the judgments of the two Courts proceeded upon entirely different grounds and disclosed a considerable conflict of judicial opinion, it is possible without presumption to offer some observations on the views expressed by the learned Judges.

It appeared that the respondent, a young girl about fifteen years of age, was employed as a domestic servant in the appellant's house, where, as she alleged, intercourse took place just before Christmas 1911, and afterwards, on many occasions until the month of March 1912, when her service was determined.

In August 1912, the appellant was committed to take his trial at the Northampton Assizes on a charge that "on or about 22nd March 1912 and on divers other occasions within six months then last past he did unlawfully and carnally know [the respondent], she then being above the age of thirteen and under the age of sixteen years."

In the month of October following, he was convicted on this charge and sentenced to a term of imprisonment. A few weeks after the trial the respondent was delivered of a child, and, in February 1913, she preferred a complaint under the Bastardy Act of 1872, the justices making the usual order subject to a case stated for the opinion of the High Court.

On the hearing of the complaint in bastardy, a superintendent of police deposed that he attended the assizes at Northampton, was present at the trial of the appellant, and heard him convicted and sentenced.

In a judgment delivered by Ridley, J., in which Scrutton and Bailbache, JJ., concurred, the Divisional Court held that the order of the magistrates must be supported.

" am of opinion," said Ridley, J., "that the conviction was admissible in evidence and was presumptive proof of the commission of the crime of which the appellant had committed, according to the principle stated in *In re Crippen*, where it was held that the proof of the conviction was presumptive proof of the commission of the crime. Another point has been raised that the conviction ought to have been proved by a certified copy of the record under sec 13 of the Evidence Act, 1871. In my opinion in a case like this, where it is not necessary to prove a conviction, but evidence of a conviction is offered by the complainant simply as part of the evidence in support of her case, the evidence of a person who was present is sufficient I think, therefore, that there was sufficient evidence before the justices for the conviction of the appellant of having had carnal knowledge of the respondent, this not being a case in which it is necessary to prove a conviction."

Now, apart altogether from any considerations arising as to the relevancy or admissibility of the conviction, or as to the mode in which it was sought to be proved, it is to be noted that, in order to establish a charge such as the one preferred against the appellant at the Assizes, the law does not require any corroboration of the story told by the girl who is alleged to have been defiled. It is, therefore, not easy to see how the fact that a conviction was obtained at the Assizes was necessarily corroborative, in any degree, of the evidence given by the girl on her application for a bastardy order. In view of the course which the case took in the Court of Appeal, it did not become necessary for that Court to deal with this point, although Phillimore, L.J., remarked significantly, "As you can convict without corroboration, ought a conviction, which may have been obtained without corroboration, to go any further than the girl's evidence? I think that that is a matter which will require some very careful consideration."

It is not proposed here to discuss the extent (if any) to which a judgment, obtained against a man on a criminal

charge, is relevant or admissible as evidence against him in a civil suit. It is sufficient to state that the Divisional Court (relying apparently on *In re Crippen*) assumed that the conviction could be treated as some evidence of the fact of carnal connection, and expressly held that, despite Lord Brougham's Act, the conviction was itself sufficiently proved by the oral testimony of the police inspector, without production of the record or of a certified copy thereof. In the Court of Appeal, Phillimore, L.J., said: "I am not certain, "as part of the history of the case (if the conviction was "admissible, as to which I desire to express no opinion), it "was not for the purpose sufficiently proved for the par- "ticular case"; but the other members of the Court clearly regarded the proof as insufficient, while counsel for the respondent did not seek to support the view of the Divisional Court on this point. "I do not myself see," said Buckley, L.J., "that it could be said that the conviction was proved, "and, in fact, Mr. Barrington Ward before us has not "raised that contention." With even greater emphasis, Kennedy, L.J., said: "I confess that it is the first time "I have heard—there may be authority of which I am "unfortunately ignorant—that oral evidence of a conviction "can be given by somebody who heard the jury give a "verdict, which is to let in indirectly evidence of the con- "viction, as to the proof of which we have express statutory "provision."

In support of the magistrates' order, a further ground was relied upon by the Divisional Court. "There is another "ground," said Ridley, J., "upon which I think that the "evidence [of the conviction] is admissible, that is, as "evidence of the opinion of the jury expressed in the pre- "sence of the appellant. I do not see how it can be said "that that was not corroborative evidence against him. "There is no authority to that effect, but, as a matter of "principle, I do not see why this evidence of the verdict

"of a jury was not some corroboration of the evidence of the respondent."

This further ground does not appear to have been relied on during the course of the argument or in the judgments delivered in the Court of Appeal; and, in view of the attitude adopted in that Court, it will be well to turn at once to a consideration of the grounds on which the order of the magistrates was ultimately supported.

It seems that, during the hearing of the application in bastardy, the police superintendent further deposed that when before the committing justices at the police court, in August, 1912, "the appellant gave evidence which suggested "that the respondent was a fast girl, and that that was the "reason of her then condition: that he (the police super- "intendant) was in Court during the trial of the appellant "at the Assizes at Northampton, but no suggestion was "then made by the defence that the respondent was a fast "girl, nor did the appellant repeat the evidence on this "point, which he gave before the justices."

This further testimony of the police superintendent was regarded by the Court of Appeal as affording evidence which "corroborated in some material particular" the evidence of the mother.

"Corroborative evidence," said Buckley, I.J., "may, I conceive, be found either in admissions by the man or inferences properly drawn from the conduct of the man. Admission here, there is none,—conduct, there is. Were or were not the justices entitled to take into account, as a matter of evidence upon which they might come to some conclusion, the fact that the man before the justices told a story, namely, that she was fast, and that her condition was due to that state of things, and the fact that, when at the Assizes he stood in peril and when, if the defence was true, it was to his interest to set it forward, he did not set it forward at all? It has been argued before us as if he could not have set up that defence without going into the box and exposing himself to cross-examination. It appears to me that that is a mistake.

"The defence could have been set up in cross-examination of the girl when she was in the box. Nothing of the kind was done."

Now an important question seems to arise as to the precise meaning of the reference by the learned Lord Justice to the "defence" that might have been set up at the Assizes. Even, if it were true that the respondent was a "fast girl," would that circumstance have afforded any answer to the charge preferred in the indictment? In other words, was it a "defence" at all? Would, indeed, affirmative evidence to support such an allegation have been admissible if tendered by or on behalf of the appellant?

He did not seek to rely on any defence resting on a "reasonable belief" that the respondent was of, or above, the age of sixteen years. It follows, therefore, that the consent, or even the solicitation, of the girl would afford no answer to such a charge, nor would the fact that other men had had intercourse with her, relieve the accused of criminality. Would not, then, any cross-examination supporting such intercourse merely tend to impeach her credit? If she had repudiated the suggestion, could her denial have been challenged? No doubt if it had been suggested that she had had intercourse with another man on some occasion which might have affected the paternity of her child, the suggestion would have been relevant to the main issue on the hearing of the application in bastardy, and, at the hearing, any denial by her might have been met by affirmative testimony; but the decision of the Court of Appeal relates to the appellant's conduct at the Assizes, and not to his conduct on the hearing in bastardy. It would seem, therefore, to follow that, in the judgment of the Court of Appeal, the appellant might have raised this issue at the Assize trial, and there offered affirmative evidence upon it. "So upon matters which are admissible in evidence," observed Buckley, L.J., "it is established that the conduct

of the man was this—that before the justices he took a particular course, and at a subsequent date, he did not take a particular course, and that that was a course which one would have expected him to take under circumstances of his innocence." Indeed, Kennedy, L.J., says in express terms: "The man had given evidence himself on the first occasion suggestive of improper conduct of other persons, and, on the later occasion, when it was very important for him if he could have shown similar conduct on her part, he withdrew that suggestion altogether."

In view of the concluding phrase used by Kennedy, L.J., it will be remembered that the evidence of the police superintendent did not import an actual "withdrawal"—merely, that the suggestion was not repeated—and this is, doubtless, the sense in which the learned Lord Justice wished his words to be understood. Indeed, it seems not unimportant to remark that, as the girl was admittedly *en<sup>c</sup>uite* at the time of the examination before the committing justices, when the appellant suggested "fastness" as the cause of her condition, his plea of "not guilty" at the Assizes did, in point of fact, necessarily involve the suggestion by the appellant that the girl had had intercourse with at least one man other than himself.

As, however, the actual circumstances of the case are extremely unlikely to recur, the particular decision becomes important only if it be found that there is, underlying the judgments, some principle applicable generally in inquiries of this class. It must, we presume, be taken that, although the respondent was some eight months advanced in pregnancy at the time of trial, the fact that the appellant then refrained—whether of his own initiative or under the advice of counsel—from repeating the suggestion that she was a "fast" girl, amounted to some corroboration of her evidence "in a material particular." But it will be noted that the Court expressed no opinion as to this "corroboration by

"conduct" amounting to such corroboration as would have been sufficient to satisfy them. "I have only to examine," said Buckley, L.J., "whether there is evidence in some material particular which could satisfy the justices, for they and not we are the people to be satisfied. "The statute," observed Kennedy, L.J., "says that it must be 'corroboration 'in some material particular,' and we must consider the particular in regard to the charge which is made, which is here one of paternity. As I say, I am not sure that I should have acted upon it."

Nor does it appear that the magistrates would themselves have regarded such corroboration standing alone as sufficient. It is manifest that they placed great reliance on the fact of the conviction. Indeed, in the report of the case in the Law Reports on the argument before the Divisional Court, there is no reference whatsoever to any other form of corroboration. Presumably, the special case did not contain a request by the magistrates that the case should (if necessary) be remitted to them. It would be interesting to refer to the depositions taken before the committing justices, in order to see in what form the appellant's suggestions that the respondent was a "fast" girl is there recorded.

In these circumstances it is, perhaps, not surprising to find that Kennedy, L.J., expressed some dissatisfaction with the course which the case had taken.

"In my view," said he, "this is an exceedingly unsatisfactory case. . . . One cannot help feeling that the admission of the conviction as a piece of evidence, which I think clearly ought not to have been admitted, was a fact which may have led to the conclusion to which they (the magistrates) came, and which may, perhaps unconsciously, have influenced their minds, although there be sufficient in the rest of the evidence for the conclusion at which Buckley, L.J., has himself arrived. Worse still, when the matter came before the Divisional Court, when the Counsel for the respondent, Mr. Barrington Ward,

"was not called upon to argue in support of the proof of the conviction, the case proceeded upon grounds which with all due respect I think are grounds which I could not possibly have supported. Indeed, Mr. Barrington Ward says that they "could not be supported. The judgment could not be supported on the grounds given. . . . With considerable hesitation I think I ought not to differ from the other members of the Court. It is, as Mr. Barrington Ward said, to use his own words, 'only just over the line.' I confess that I feel some doubt whether it is over the line at all."

CHARLES M: ATKINSON.

#### V.—SOME CHANGES IN THE LAW OF NATURALISATION.

IT is generally admitted that the English law on the subject of the naturalisation of aliens<sup>1</sup> and their status when naturalised has hitherto not been entirely satisfactory, and few persons have found a good word to say for the Naturalisation Act 1870. In 1899, Sir Matthew Ridley, who was then Home Secretary, appointed an Inter-Departmental Committee to report upon the matter and to advise as to further legislation. In July 1901 this Committee made their Report, recommending (*inter alia*) (1) That the existing statute law should be consolidated; (2) that the existing law as to acquisition of British nationality by parentage should be re-enacted in a simpler form, and provide that where the father was born out of the British Dominions, a child also born abroad should not be a British subject; (3) that power should be conferred on a Secretary of State or the Governor of a British possession to confer the status of a British subject upon persons who fulfil the requisite conditions in any part of the British Dominions, and that the status so conferred should be recognised by British law everywhere.<sup>1</sup>

<sup>1</sup> See the Report printed *in extenso* in Foote, *Private International Jurisprudence*, 4th Ed., pp. 23 *et seq.*

After a lapse of twelve years the labours of this Committee have borne fruit, and many of their recommendations are found embodied in the Act with which this article deals; although, indeed, some of the provisions of the Act are quite contrary to the suggestions of the Committee.

The British Nationality and Status of Aliens Act, 1915 (4 & 5 Geo. V, c. 17) came into force on the 1st of January 1915, and is a statute of far-reaching importance; indeed, if the great war had not so much absorbed the attention of the country, the provisions of this statute would doubtless have come in for a far greater measure of attention than they have received. As recommended by the Committee, the statute repeals the earlier legislation on the subject and consolidates the law, but while so consolidating it, the statute makes also numerous alterations and additions.

The first alteration in the law is made by sect. 1, in which it is declared that—

The following persons shall be deemed to be natural born British subjects, namely:

- (A) Any person born within His Majesty's Dominions and allegiance; and
- (B) Any person born out of His Majesty's Dominions whose father was a British subject at the time of that person's birth, and either was born in His Majesty's allegiance or was a person to whom a certificate of naturalisation had been granted, and
- (C) Any person born on board a British ship whether in foreign territorial waters or not.

There is also a provision that a person born on board a foreign ship shall not be deemed to be a British subject by reason only that the ship was in British territorial waters at the time of his birth.

The Act of 1870 contained no definition of the term "a natural-born British subject".

Now, by Common law every person born within the

British Dominions is a natural-born British subject; every person born outside the British Dominions (with few exceptions) is an alien.<sup>1</sup> The statute 4 Geo. II, c. 21, enacted an exception to this rule in providing that a person born abroad whose father was a *natural born* British subject should himself for all purposes be considered a natural-born British subject, assuming that the father had remained a British subject. This exception was followed by another added by 13 Geo. III, c. 21, which declared that the son of such a person so born abroad should himself, although born abroad, be considered to be a natural-born subject, with the same proviso as before.

A few things call for notice in connection with these old statutory provisions (which are now repealed) (1) Such statutory subjects were to be deemed *natural born* subjects; (2) the father or grandfather of the person so born abroad must have been a *natural-born* subject—not a person made a subject by naturalisation or denization (3) the father must have remained a British subject at the time of the birth of the person whose nationality is in question, (4) the possession of an English mother or grandmother was not sufficient—it must have been a father or grandfather. The Naturalisation Act of 1870 did not affect these provisions, so that a person naturalised under that Act whose children were born abroad could not transmit British nationality to such children, who could only become British subjects by residing during their minority in the United Kingdom with their father or subsequently becoming naturalised. The new Act effects far-reaching changes in this, as will be seen by a perusal of sect. I. The anomaly of considering a person born abroad to be a British subject whose father might perhaps never have been within the dominions of the Crown (as could happen under 13 Geo. III, c. 21) is

<sup>1</sup> See *British Law of the Constitution*, Vol. II, Part I, p. 240. Piggott, *Nationality*, p. 41.

swept away, and British nationality in the case of persons born abroad is confined to the first generation, as recommended by the Committee's Report. There is, however, the important proviso that the father of such person so born abroad need only be a *naturalised* subject. Again this is in accordance with the views of the Committee.

The Act of 1870 required applicants for naturalisation to have resided within the United Kingdom for five years or to have been in the service of the Crown for that period. Further, the applicants were required to state their intention either to reside in the United Kingdom or to serve under the Crown. The new Act (sect. 2) provides that the five years' residence may have been in any of His Majesty's Dominions. So that, e.g., while formerly a Frenchman, who, after having lived, say, in Australia for three years, came to England, would have had to reside here for five years before he could apply for naturalisation; now, such a person could add his period of residence in Australia to that in the United Kingdom, and apply for a certificate after a further two years' residence in England, making, with the three years he resided in Australia, the five years' residence required by the Act. It is, however, stipulated that the applicant must actually have resided in the United Kingdom for not less than one year immediately preceding the application for naturalisation, and there must have been previous residence either in the United Kingdom or in some other of His Majesty's Dominions for a period of four years within the last *eight* years before the application (sect. 2, sub-sect. (2)). Every applicant must now also prove that he is of good character and has an adequate knowledge of the English language. This provision is also new; although, of course, the inquiries made by the Home Office in all cases of naturalisation would usually prevent persons of bad character obtaining such certificates. It is a matter of interest how the language

test will be enforced; doubtless the Home Secretary will make some rules as to this.

By the Common law marriage had no effect on the nationality of a woman, either to make a foreign woman English, or an English woman foreign.<sup>1</sup> By sect. 10 of the new Act (replacing sect. 10 (i) of the Act of 1870), it is declared that the wife of a British subject shall be deemed to be a British subject, and the wife of an alien shall be deemed to be an alien. A woman thus becoming an alien on marriage, remains an alien on her husband's death, until she takes the requisite steps to re-acquire British nationality, which, under the Act of 1870, were similar to those required of aliens in general, necessitating residence in the United Kingdom during the preceding five years. The new Act (sect. 2, sub-sect. (5)) provides that, where a woman who was a British subject previously to her marriage and whose husband has died, or whose marriage has been dissolved, the requirements of the Act as to residence shall not apply, so that such a woman may apply for a certificate of re-admission to British nationality immediately after the death of the husband or the dissolution of the marriage. This provision is contrary to the Committee's recommendation.

As mentioned above, formerly the children (born abroad) of a naturalised subject were not themselves *ipso facto* British subjects. Now, by the joint effect of sect. 1 (ii) and sect. 3 (i), such children will be *natural-born* subjects; sect. 3 (i) enacting that a naturalised subject shall, subject to the provisions of the Act, be entitled to all political and other rights, powers and privileges, and be subject to all obligations, duties and liabilities to which a natural-born subject is entitled or subject, and, as from the date of his naturalisation, have to all intents and purposes the status of a natural-born British subject.

<sup>1</sup> *Countess of Conway's Case*, 2 Knapp, 368.

It will, no doubt, be remembered that sect. 3 of the Act of Settlement 1701 provides that no person born out of the Kingdoms of England, Scotland, or Ireland, or the Dominions thereunto belonging, although he be naturalised or made a citizen, except such as are born of English parents, shall be capable to be sworn of the Privy Council, or a Member of either House of Parliament, or to enjoy any office or place of trust, either civil or military. By sect. 3 of the present Act the Act of Settlement is to take effect as if the words "naturalised or" (italicised above), were omitted. Until 1870 a person who had been naturalised could not become a Member of Parliament or a Privy Councillor, and although the Naturalisation Act of 1870 conferred full political rights on aliens, the words mentioned above were not repealed, and the Committee, in 1901, recommended that they should be deleted.

Under the Act of 1870, by sect. 7, a naturalised subject, if still retaining his earlier nationality, was not to be deemed a British subject when within the limits of the State whose citizenship he retained.<sup>1</sup> This provision has met with a good deal of criticism, and has been construed in different senses by different authorities, and the Committee in their Report recommended the abolition, as far as possible, of all differences between the status of a natural-born British subject and a naturalised British subject. The new Act apparently accepts the Committee's view and drops the distinction between the status of such a person when within the State of his former nationality and his status in the United Kingdom and in all other places, by enacting that he is to have to all intents and purposes the status of a natural-born British subject (see sect. 3 (1)).

Section 5 gives effect to a further recommendation of the Committee, by providing that the Secretary of State may, in his absolute discretion in any special case, grant a certificate

<sup>1</sup> See also *In re Bourgeois* (1889), 41 Ch. D. 200.

of naturalisation to any minor although the conditions required by the Act have not been complied with. Sub-sect. (1) provides that where an alien obtains a certificate of naturalisation the Secretary of State may, on the application of such alien, include in the certificate the name of a child who is a minor, and the child shall thereupon, if not already a British subject, become a British subject. Any such child may within a year of his attaining majority make a declaration of alienage and so cease to be a British subject.

A much-needed reform is introduced by sect. 7 of the Act, carrying into effect the views of the Committee as expressed in their Report, which gives power to the Secretary of State where it appears "that a certificate of naturalisation granted by him has been obtained by false representations or fraud," to make an order revoking such certificate, and by sub-sect. (2), where the Secretary of State revokes such a certificate, he may order the certificate to be given up and cancelled, and any person declining to give up such certificate will be liable to a fine of not exceeding £100. Prior to this enactment, an alien who had, through fraudulent misstatements in his applications or in the declarations accompanying it, obtained the status of a naturalised British subject could not be deprived of the privilege of British nationality and be made an alien again. He could only be punished for his fraudulent misstatements. Sect. 16 of the Naturalisation Act 1870 (now repealed) gave power to the Governments of British Colonies to naturalise applicants, but this power was expressly restricted in its operations to the limits of the colony granting the certificate, so that, e.g., if a German obtained a certificate of naturalisation in Canada, he would not be entitled to be regarded as a naturalised British subject in Great Britain, but if he desired to be naturalised here, he would have to fulfil the requirements of five years' residence in the United Kingdom or five years' service under the Crown; also, naturalisation

in the United Kingdom did not extend to British possessions.<sup>1</sup> Now, by sect. 8 of the new Act, the Government of a British possession has the same power to grant a certificate of naturalisation as the Secretary of State has, and the provisions of the Act as to the grant and revocation of such a certificate also apply. There is, however, a very important proviso to this section. It is declared that in any British possession (other than British India, the Dominion of Canada, the Commonwealth of Australia, the Dominion of New Zealand, the Union of South Africa, and Newfoundland) the powers of the Government of such possession, as regards the granting or revocation of a certificate of naturalisation, shall be subject in each case to the approval of the Secretary of State, and any certificate proposed to be granted shall be submitted to him for his approval. It is also declared that any certificate of naturalisation granted in a British possession shall have the same effect as a certificate of naturalisation granted by the Secretary of State. It should be particularly noted, that in this way a certificate granted in a British possession is given effect outside the limits of the possession. In the British possessions specifically mentioned above, the power is vested in the Government; in other possessions, in the Governor or in a person acting under his authority. It is further provided (sect. 9) that none of the above provisions nor any certificate of naturalisation granted under the Act shall have effect within any of the Dominions specified above (except in British India), unless the Legislature of such Dominion first adopts those provisions. This is another illustration of the increasing tendency not to force the legislation of the Imperial Parliament upon the self-governing Colonies without their consent or contrary to the wishes of their peoples as voiced by their representatives, but to give such Colonies an opportunity of considering whether to accept or reject such provisions.

<sup>1</sup> See Piggott, *Nationality*, Part I, p. 240.

SECTION 10 embodies a novel provision in declaring that where a man ceases during the continuance of his marriage to be a British subject it shall be lawful for his wife to make a declaration that she desires to retain her British nationality, and that thereupon she shall be deemed to remain a British subject. This provision is certainly new. It refers to the case of a man who, under the provisions of sect. 13 of the new Act (substituted for sect. 4 of the 1870 Act), becomes naturalised in a foreign State and so loses his status as a British subject. The wife of such a person may, if she so desires, retain her British nationality by simply declaring that she does not desire to change it.

The above are the chief changes introduced by the new Act, and on the whole it will be seen that the tendency is in favour of greater strictness in the requirements for applicants for naturalisation, while many sensible provisions as to the status of aliens, and with regard to the position of women married to aliens are also contained in the Act. It will be observed that no distinction is made between "alien friends" and "alien enemies."

W. E. WILKINSON.

## VI.—CONTRABAND OF WAR.

**C**ONTRABAND of war, in the conception of International law, consists of those things which, in accordance with the rules which by universal consent are binding on belligerent and neutral States, a belligerent State absolutely or conditionally forbids the subjects of neutral States to carry to her enemy.

The theory of contraband received recognition in very early times,<sup>1</sup> but not until the Middle Ages did the theory

<sup>1</sup> Grotius, *De Jure Belli ac Pacis*, liber III, c. I, § 5.

find expression in international rules designed to govern the conditions of commercial intercourse between belligerents and neutrals.

While on the one hand, neutrals have never tolerated that belligerents should arbitrarily declare what things are to be contraband, on the other the tendency of belligerents has been to enlarge the category of contraband; the result has been that a protracted process of ordinances, conventions and declarations, culminating in the Declaration of London, has secured a fairly authoritative and accurate definition of the things which respectively fall within the category of absolute and conditional contraband.

The law of contraband is international, not municipal: in the absence of any treaty to the contrary, the subjects of a neutral State are not forbidden by Municipal law from carrying on commercial intercourse with belligerent States in all things contraband, subject to the risk of capture, forfeiture, or other penalty at the hands of the enemy of the State to which they attempt to convey them.

The Municipal laws of many States restraining their subjects from fitting out armaments or supplying levies for foreign belligerents are of modern origin and have no relation to contraband, but prior to the enactment thereof the performance of such acts by the subjects of neutral States was not unlawful.<sup>1</sup> So again, acts done by a State in its organic capacity in violation of neutrality are outside the law of contraband.

Articles of contraband were defined and divided into two classes by Grotius, viz., those which are useful only for the purposes of war, and those which may be useful for the purposes of war or peace. *Sunt enim quæ in bello tantum habent usum ut armis, . . . . Sunt quæ in bello et extra bellum usum habent, ut pecunia, commercio et naves et quæ navibus adsunt.* The principle of his division is recognised at the

<sup>1</sup> Fortescue's Reports, p. 388, and 7 Wheaton's Reports, 285.

present time, but the progress of science and the fertility of invention has modified and will continue to modify the classification of articles which fall within the two divisions.

Little exception can be taken to the classification of absolute and conditional contraband contained in the Declaration of London; the inclusion of horses and mules in the list of absolute contraband is open to objection, and was sanctioned only by a bare majority of the Conference; it should be noted that the Declaration contains a proviso that "articles and materials exclusively used for war may be added to the list of absolute contraband by means of a notified declaration."

In conformity with the Grotian principle, the Declaration sets out a list of those things which may not be made contraband, *i.e.*, absolute or conditional; that list includes cotton, which Russia in her recent war with Japan declared contraband, and rubber, the use of which for traction is of essential value in modern warfare; metallic ores are also included, this means ores in their crude state and would not cover copper in a manufactured form.<sup>1</sup>

The things to which the term absolute contraband is applicable are *de plein droit*, *i.e.*, without notice on the outbreak of war, prohibited from being carried by neutrals to the territory of a belligerent, and both ships and cargo may be captured, condemned, and confiscated by the belligerents' enemy.

Things to which the term conditional contraband is applicable fall within that category when their destination is of a certain character. Belligerents are authorised by the Declaration of London (Art. 25) to add articles and materials susceptible of use in war, as well as for purposes of peace, to the list of conditional contraband by means of a declaration. Destination is the test alike as to articles liable to be treated as absolute or conditional contraband: it has

<sup>1</sup> The English Government by recent Order in Council has included rubber and unwrought copper among things contraband.

never ceased to be a vexed question between belligerents, and has at the present time given rise to some friction between England and the United States of America.

The rule which England uniformly accepted and generally observed until the promulgation of the Declaration of London was, that the destination of the ship and not the cargo, both in the case of absolute and conditional contraband, as evidenced by the ship's papers, was to be the sole criterion as to the fate of ship or cargo or both. The sole exceptions to the application of this rule were when the ship was out of the course which her papers indicated she should be on, and on a course to a prohibited place; where from internal evidence the ship's papers were demonstrably fraudulent, where members of the crew made credible admissions as to destination in defiance of what was stated in the ship's papers.

Against this unambiguous rule neutrals could have no just cause of complaint: no question of intention, of transhipment, of land carriage after discharge of cargo, of proximity of neutral territory to the enemy's territory or forces ever arose: if the ship's destination were to a prohibited territory or place she was amenable, if to a neutral port she was immune.

The doctrine of "Continuous voyage," which resulted from the "Rule of the War of 1756," is in no wise inconsistent with the rule that a vessel is only liable to capture when on her course to a prohibited place. In 1756 France, which was in a position of naval inferiority to England, opened its colonial trade to Dutch ships, but excluded other neutrals. The English seized three Dutch ships, on the ground that such privileged trading by neutrals was tantamount to the identification of such neutrals with the enemy, and such ships and their cargoes were adjudged to be lawful prize. The application of this rule against neutrals gave rise to an attempt at evasion by the device of making

colourable importation into some port with which trade was not prohibited, and thence conveying the cargo to the prohibited port. The English Courts held that the destination of the ship was to be ascertained, not by its voyage to the port of colourable importation, but by that to the prohibited port, and that a vessel seized on its ultimate voyage from the former port was lawful prize.

A case which clearly demonstrates that the doctrine of continuous voyage only justifies the capture of a ship when she is actually on her course to a prohibited place is the *Imina*.<sup>1</sup> This ship was captured by an English war-vessel when on her course to Emden, a neutral port, which was in close and easy proximity to enemy territory; Lord Stowell (then Sir W. Scott) ordered her release, in spite of the fact that Emden was a facile base of supply for the enemy, and that his Court was prohibiting English merchants from sending goods to Emden as coming within the law against trading with the enemy; he observed—"The rule with respect to contraband is, that the articles must be taken *in delicto*, in the actual prosecution of a voyage to the enemy's port."

The perversion of the sound doctrine of "continuous voyage," as expounded by the English Courts, bore its first evil fruits in a case decided by the French Council of Prize during the Crimean War, *The Frau Houwina*.<sup>2</sup> The vessel was captured by a French man-of-war while on her voyage to a neutral port; the French Court did what Lord Stowell declined to do, they observed that the imports of saltpetre and sulphur—with which the vessel was loaded—had gone suddenly up and a brisk trade was being done in these goods with Russia by overland route, and on these grounds the Court condemned ship and cargo. It is noteworthy that these constitute the grounds (*inter alia*) upon which our Foreign Office seeks to excuse its interference with American ships on their voyage to neutral ports.

The Prize Court of the United States of America during their war with the Confederate States, on the false analogy of the English doctrine of continuous voyage, pursued the same course in *The Peterhoff*;<sup>1</sup> this ship was on her voyage to a neutral port: the Court inferred that the cargo, after being unloaded in the neutral port, might be taken by lighters up a river to the Confederate territory, and therefore it condemned ship and cargo.

This doctrine of intention, founded as it has been and must be on mere conjecture and suspicion, has now been embodied as part of the Law of Nations in the Declaration of London. Henceforth, the ships of neutral States carrying cargoes to the ports of neutral States are to be exposed to the inconvenience and pecuniary loss of protracted search, and to the very probable event of capture and condemnation, because the naval officer of a belligerent ship chooses to assume that the cargo may be intended for a prohibited place. The new conditions of naval warfare and coast defence have rendered blockade, for all practical purposes, obsolete, with the result that belligerents have manifested a disposition to strengthen in their interest the law of contraband, and the Declaration of London proceeds upon these lines; it enables the belligerent, on the pretext that her cargo is "intended" for her enemy's use, to visit, search and capture a neutral ship in any quarter of the high seas.

Again, convoy has under modern sailing conditions become impracticable, and has not been resorted to for many years.

The right of search constitutes the most delicate and difficult question incident to the law of contraband. It is a right of the belligerent universally acknowledged by nations and publicists, even by Hubner, the uncompromising champion of the privileges of neutrals; the antiquity of

<sup>1</sup> 5 Wall, 47.

the right is unquestionable, and it appears to have been recognised as early as 1164 by the Christian and Mahomedan powers of the Mediterranean.<sup>1</sup>

But although the principle of the right of visit and search is conceded, the application of the principle has been the source of much friction between belligerents and neutrals. The "Armed Neutralities of 1780 and 1800" were the result of the arrogant pretensions of England in reference (*inter alia*) to the exercise of this right. It may in the first place be unequivocally stated that it is the duty of the naval officer of the visiting ship to cause as little inconvenience and delay as possible in the exercise of the right; indeed the English Admiralty rules provide as follows: "In exercising the right of visit, the commander should be careful not to occasion to the neutral any delay or deviation from her course that can be avoided, and generally to cause as little annoyance as possible."

Circumstances may exist which would prohibit expeditious search and involve prolonged detention of the suspected vessel; obstruction by her crew, boisterous weather rendering the dispatch of an open boat from the warship hazardous; the proximity of enemy men-of-war—<sup>are undoubtedly adequate reasons for what would otherwise be undue detention; in these or cognate cases, the commander of the naval ship may order the neutral vessel to lie to, to lower her flag and steer according to his directions, or to proceed to a named port.</sup><sup>2</sup> These constituted in former wars practically the only valid reason for detention of an innocent vessel beyond the time absolutely necessary for reasonable examination, but modern warfare has afforded another cause justifying prolonged detention, namely, the grave peril to which a warship is exposed from submarine attack in waters where such danger exists; under such

<sup>1</sup> Twiss, Vol. II, 147, 2nd Edition.

<sup>2</sup> *The Edward and Mary*, 3 Rob. 508 (1801).

circumstances the naval commander would naturally direct the neutral vessel to proceed to the most contiguous port where the right of search might with safety be exercised.

The extent to which the right of search or examination should proceed are as follows — If upon examination the ship's papers appear to be in order and there are no extraordinary circumstances to arouse suspicion, the visiting officer must immediately withdraw and the vessel must be allowed forthwith to proceed upon her course, but if, on the contrary, the ship's papers upon examination afford intrinsic evidence of *mala fides*, or if, from the failure of the vessel to reduce speed or shorten sail when signalled to do so, any opposition to the visitation, any attempted concealment, destruction or jettison of papers, any suspicious conduct of the master or of the crew then the vessel may be subjected to a more minute examination either of documents, or of the officers or members of the crew, or other persons on board, or of the cargo.

Some jurists, including Dr Martens<sup>1</sup> and Massé,<sup>2</sup> limit the right of search to the simple case where the papers are incomplete or irregular, and Hautsch will, would permit no further investigation than the papers, even where the visiting officer doubts or professes to doubt the genuineness of the papers, or the truth of their contents.

In view of the interchange of views between the governments of the United States of America and England of the alleged abuse by the latter power of the right of search, it is interesting to take notice of the instructions issued by the Navy Department of the former Government, on 20th June, 1898 which still remain in force; they are as follows. —

i2 The belligerent right of search may be exercised without previous notice upon all neutral vessels<sup>3</sup> after the beginning of

<sup>1</sup> *Op. de la Mer*, Liv III p. VIII

<sup>2</sup> *Droit Cons.*, Liv II, tit. IV

<sup>3</sup> It is hardly necessary to state the vessels belonging to the Government and its agents are not liable to search.

the war to determine their nationality, the character of their cargo, and the ports between which they are trading.

13. The right should be exercised with tact and consideration, and in strict conformity with treaty provisions wherever they exist. The officer should first examine the vessel's papers to ascertain her nationality and her ports of departure and destination. If she is neutral and trading between neutral ports the examination goes no further. If she is neutral and bound to an enemy's port not blockaded, the papers which indicate the character of her cargo should be examined. If these show contraband of war the vessel should be seized; if not, she should be set free, unless by reason of strong grounds of suspicion a further search should seem to be requisite.

The provisions of the Declaration of London in relation to contraband have materially increased the risk of inconvenience and loss to neutrals resulting from visitation and search. Although the Declaration has not been ratified, and is therefore no part of the Law of Nations, all the chief maritime powers, including the United States, are signatories thereto, and England, subject to certain modifications and exceptions, has intimated her intention during the present war to be bound by its provisions.

Article 35 of the Declaration enacts that the ship's papers shall be proof of the destination of the ship, and this, as we have seen, was the old rule under which, with one or two remarkable exceptions, nations have acted in respect of visitation and search, a rule the general observance of which has secured pleasant relations between neutrals and belligerents. Unfortunately M. Renault, the French representative at the Conference, imposed a gloss which has rendered this rule wholly illusory. The comment of M. Renault upon this article is—“It must not be too literally interpreted, for that would make all frauds easy.” M. Guizelion grossly misinterpreted the rule by which naval officers in the Courts may be guided in their conduct and

decision?" The English Foreign Secretary, Sir E. Grey, answers it in the affirmative: he says, "In accordance with the principles and practice of continental jurisprudence, such a report is considered an authoritative statement of the meaning and intention of the instrument which it explains, and consequently, Foreign Government and Courts, and no doubt also the International Prize Court, will continue to interpret the Declaration in the light of the commentary given in the report."

It cannot be doubted that by the light of this commentary a naval officer will interpret the rule, as he conceives, in the interest of the belligerent whom he represents rather than of the neutral, and vessels will be, and probably have been, detained for a protracted period, to the serious detriment of ship-owner and merchant, while the cargo is minutely overhauled, even if the greater evil of capture does not ensue. It should, however, be observed, that the United States and the other Powers were signatories to the Declaration to which the commentary was attached, and have taken no exception to the interpretation placed upon it by Sir Edward Grey.

It is further to be observed that, as already stated, the test whether or no the ship is destined to an enemy territory no longer decides her guilt or innocence. Formerly, a ship carrying munitions of war to a neutral port could not be molested, even if it were obvious that they would thence be carried by land or water to the enemy, the sole test was the destination of the ship. By Art. 22 of the Declaration the destination of the cargo is the test, and "it is immaterial whether the carriage of the goods is direct or entails either transhipment or transport over land;" thus, a vessel bound for Rotterdam, in neutral territory, may be captured if the naval officer surmise it is the intention of the shippers that the goods will be sent into Germany. The English Government, in a memorandum drawn up for the use of the

London Conference, defines this process as constituting a "continuous voyage"; it is hardly necessary to observe that it is totally distinct from "continuous voyage" as defined by Lord Stowell, and as generally conceived by European Prize Courts. It is true that England so applied the doctrine in the case of *The Bundesrath* during the South African War, on suspicion that the cargo, although the ship was destined to the neutral port of Lorenço Marques, was intended for the Transvaal Government, but Germany induced England to restore and pay compensation. If this new rule be applied with the severity to be anticipated from naval officers, it will be difficult for a neutral State, whose territory adjoins that of a belligerent, to satisfy her own requirements of munition of war or even of civil supplies in goods which are at all suspicious.

Article 33 of the Declaration makes conditional contraband liable to capture if it is shown that it is "destined for the use of the armed forces or of a government department of the enemy State," and "this destination is to be presumed if the consignment is addressed to enemy authorities or to a trader (*commencant*) established in the enemy country, where it is well known that this trader supplies articles and materials of this kind to the enemy. The presumption is the same if the consignment is destined to a fortified place of the enemy, or to another place serving as a base for the armed forces of the enemy."

In some respects, a ship carrying things which fall under the designation of conditional contraband is, under the Declaration, in a more favourable condition than one carrying things of absolute contraband: the doctrine of continuous voyage does not apply unless the enemy territory has no seaboard, nor would they apparently be liable to capture if destined for the civil government of a colony of the belligerent. On the other hand, M. Renault's commentary would appear to apply, and the time-honoured rule

of pre-emption is abrogated, the ship loses its freight and is liable to confiscation.<sup>1</sup>

Very important modifications of the Declaration of London are contained in an Order in Council, dated 29th October, 1914, which superseded the Order dated August 29th.

(iii) Notwithstanding the provisions of Article 35 of the said Declaration, conditional contraband shall be liable to capture on board a vessel bound for a neutral port if the goods are consigned "to order," or if the ship's papers do not show who is the consignee of the goods, or if they show a consignee of the goods in territory belonging to or occupied by the enemy.

(iv) In the cases covered by the preceding paragraph (iii), it shall be upon the owners of the goods to prove that their destination was innocent.

Where it is shown to the satisfaction of one of his Majesty's Principal Secretaries of State that the enemy Government is drawing supplies for its armed forces from or through a neutral country, he may direct that in respect of ships bound for a port in that country, Article 35 of the said Declaration shall not apply. Such direction shall be notified in the *London Gazette*, and shall operate until the same is withdrawn. So long as such direction is in force, a vessel which is carrying conditional contraband to a port in that country shall not be immune from capture.

These provisions are diastic, but they adopt the principle laid down by the American Prize Court in *The Peterhoff* above referred to, namely, that "intention" is to be the true test as to whether a ship is liable to capture and not her destination as evidenced by the ship's papers, and, as the fact that the cargo be consigned "to order," or show no consignee, constitutes a cogent piece of evidence for drawing the inference that it is "intended for the supply of the enemy."

<sup>1</sup> Report on Declaration of London, cited in Int. Law topics, 1908.

The English Government protested against the action of the American Courts, but Lord John Russell, then Foreign Secretary, stated that "he was far from pressing hard on the United States," and declined to put any impediment in the way of the capture of British merchant ships, and declared, in spite of strong remonstrances, that he placed full reliance on the justice of the American Courts.

There has been much calculation as to what is meant by the phrase, "a place serving as a base for the armed forces of the enemy," whatever might be the intention of the Conference, as there are no words of limitation defining whether "base" means "base of operations" or "base of supply;" there can be little doubt that the naval officer of a belligerent would give the latter interpretation to the word base, and thus in effect establish a blockade of a belligerent's entire littoral.

That neutral States during the present war suffer severely from the partial interdiction of their commercial intercourse with Northern Europe cannot be questioned, neither can it be questioned that England has exercised with extreme severity her international rights against neutral commerce, but hereon the words of a great jurist, Gentilis, written forty years before the work of Grotius was published, may well be quoted: "*Est aequum regnus, et favorabili favorabilius et utile utilius. Lucrum commerciorum sibi perire nolunt. Illi nolunt quid fieri quod contra salutem est. Ius commerciorum aquum est et hoc regni tuendae salutis, est illum gentium jus, hoc naturae illud privatorum hoc regnum.*" We are contending with an enemy who has revived methods of warfare which were all but buried in oblivion, and has applied the inventions of modern science to perpetrate the acts of barbarians, for against our enemy it is not a struggle for victory and an honourable peace, but for our subjection and degradation as a State and as a people. Under such circumstances we have a

right to expect that neutral Governments will extend some measure of toleration for any undue strain imposed by us upon the rights of neutrals. It is the good fortune of our enemy that her naval and geographical situation has only in one conspicuous instance permitted her to violate the rights of neutrals, but therein she has outraged *τὰ πάντα τὰς ανθρωπῶν νόμους*, for by secret engines of destruction, she has made the ocean highways of the world a terror to the peaceful mariner.

L. A. ATHFRLEY-JONES.

## VII.—CURRENT NOTES ON INTERNATIONAL LAW.

### *Freight. pro rata itineris.*

WHEN, previously to the Declaration of Paris, an enemy's cargo was captured on board a neutral vessel, the carrier was, as we know, entitled to freight. And she was entitled to her full freight, though she might have performed only a small portion of the voyage. Capture was treated as equivalent to delivery. She had, at any rate, lost her voyage, and the Court would not embark on an inquiry as to her prospects of obtaining another on equally favourable terms. The captors had made a windfall, and they might well be generous, and pay the agreed freight. An inquiry into the actual amount which would be a fair compensation *pro rata itineris* would be, as Lord Stowell said, an inquiry difficult in execution and uncertain in result.

But the case is different if the voyage is not thus abruptly terminated by the capture of the goods, but becomes illegal through the outbreak of war. If a ship is *en route* to her enemy's port, she must discontinue her voyage, but it does not follow that she will have full freight for the cargo.

If it be enemy property, it will, if the vessel makes for a home or an allied port, be seized and detained, or confiscated. If it be other property, it will be subject to the usual rights of cargo-owners when a voyage becomes impossible. In the former case, we can see no good reason why the ordinary rule of capture should not prevail, why capture should not be treated as delivery, nor why the owner should not have his full freight. In *The Juno*, nevertheless, the President referred it to the Registrar and merchants to allow *pro rata* freight only. Apparently he was not deterred by the difficulties and uncertainties which, according to Lord Stowell, those expert persons would find in their path. The voyage had, unlike that of a neutral ship, become illegal, and the President considered that the owner must take the risk of that among other dangers of the traffic. Of course there are cases in which justice can only be done by allowing *pro rata* freight. Thus, in *The Copenhagen* (1799, 1 C. R. 289), Lord Stowell himself allowed it when a ship was forcibly detained and her cargo sent on. *Pro rata* freight was originally (Malyne, 98) introduced to meet the case of a disability of the ship which does not admit of the contract of carriage being performed somehow, though possibly in too expensive a fashion to be profitable, so that in the interests of all parties, the voyage is treated by express or tacit consent as at an end in the intermediate port. If the ship declined to make any effort to forward the cargo, she was entitled to no freight. If the shipper declined to wait for repairs, or to permit transhipment, so as to enable the shipowner to earn the full freight, he was obliged to pay the full freight. But if the parties tacitly agreed to treat the voyage as at an end, then the shipowner could claim only a *quantum minimum*—freight *pro rata*. This reasoning by no means applies, where the goods cannot lawfully be sent on at all, by whatever vehicle. It is probable, therefore, that the fair and equitable rule should

have been applied in *The Juno*, which makes the captor liable to reimburse the ship in full, before he indulges himself with the proceeds of his warlike act.

If the goods were not captured, but, being friendly or neutral property, were merely stopped in their transit to Germany in a British ship, the problem would have become more difficult, and would, of course, be one for the Courts of Common law. It would seem that in such a case, since there is no prospect of a very early resumption of traffic, the voyage is at an end. Now freight is not payable if the goods have been taken to a port where the shipper does not want them. One may be clearly of opinion that no freight is due in such circumstances, though it seems equally clear that no damages are due from the shipowner for the failure to carry the goods on. In the case of a British ship, public policy would prevent the recovery of damages; in the case of a neutral ship justifiably deterred from proceeding by the physical dangers of navigation (supposing the charter-party and bills of lading to be governed by English law), *The Teutonia* ([1872], 3 A. & E. 436), *Jackson v. Union Mar. In. Co.* ([1874], 10 C. P. 125), and *Geipel v. Smith* (L. R., 7 Q. B. 404), seem to suggest the same answer. Advance freight might perhaps be retained, under the inequitable principle of *Chandler v. Webster* ([1904]; 1 K. B. 493).

In the particular case of *The Juno* (20 Dec. 1914) the goods were (apparently) enemy goods, shipped in Ireland for Amsterdam, but to go to Germany. According to *The Jonge Pieter*, this was unlawful trade for a British ship—Amsterdam being exactly in the position of Emden in the latter case! The ship put into Swansea, where the cargo was captured. It was referred, as above stated, to fix a *pro rata* freight; the Registrar being instructed to allow nothing for the delays and inconveniences of war.

### Annexation.

The anomalous position which has so long existed in Egypt is certainly put an end to by the emancipation of that country, along with Cyprus, from their nominal Turkish suzerainty. One is obliged, however, to question very strongly whether such an emancipation is a proper method of warfare. Formerly it used to be considered perfectly proper to possess oneself in war-time of an enemy's territories. The invader, by the theory of substituted sovereignty, became the owner. Thus Frederic II, when Silesia and Saxony were invaded, treated the population as his subjects, and forced them into his armies. That this is not possible to-day in Belgium results from a change which is universally admitted to have come over the character of an invasion. It cannot ripen into a change of sovereignty until the dispossessed sovereign has recognised the invader as owner (*i.e.*, has ceded the occupied provinces)—or until there is no longer any possibility that he will ever be able to regain them. This modern principle was, unfortunately, set aside in the South African war—which set a good many bad precedents on a small scale—but that was not a war between independent States, and cannot contradict the trend of modern opinion.

Does, then, this accepted doctrine, that it is unlawful to treat an "occupied" territory as one's own, extend to the displacement during war, of suzerainty and vassalage? Needless to say, the incidents of the suzerainty may be suppressed by the conqueror, where the suzerain is his enemy. Egyptian or Cypriote tribute to Stamboul may clearly be cut off. But is it possible to treat the Ottoman sovereignty as displaced, and Cypriotes or Egyptians as compellable to fight against Turkey? The question has a double aspect. Cypriotes were Ottoman subjects. Egyptians were primarily of Egyptian nationality. In the former

case, we are inclined to think that the ordinary rule holds; that the fact that a British force was already present on the spot does not alter the ordinary rule, that military occupation does not and cannot change the allegiance of the people. Of course, it is competent to the British Government to confer the rights of British nationality on any particular class of its enemies. But it cannot impose on them the duties of British subjects, *tendente bello* and none the more because it has been administering the territory during peace. Indeed, it would seem that the reservation of suzerainty and tribute to Turkey was directed to this very object—the preservation of the essentially Ottoman character of the island in all circumstances.

Egypt is in a different position. It has a decided, though an anomalous, international status. Its government, though almost entirely under British control, entered into diplomatic international relations. Consequently, it is possible that the inhabitants may find their international relations determined, not by their individual circumstances, but *en bloc* by the action of their government. Had the Khedive Abbas revolted from the Turkish suzerainty, it is impossible to say that an enemy of this over-lord would have been infringing any canon of war by recognising his independence, and the absolution of all his subjects from their Turkish allegiance. But nothing of the kind happened. and it is exceedingly difficult to distinguish from annexation the deposition of the suzerain's vassal and the establishment of a more compliant one. If Brabant were, through a Germanised governor, to tender its allegiance to the Emperor William, no national validity could attach to the transaction. The position of Egypt is doubtless very different: but to strike at the bonds of allegiance in time of war is dangerous, inconsistent with sound doctrine, and might have inconvenient results for ourselves.

The particular course adopted—viz., the taking of Egypt into British protection, instead of frank annexation—is a matter of mere form. Protection, coupled with entire control, amounts to annexation in International law. Napoleon's vassal kingdoms, such as Westphalia, were never considered as having an existence apart from France. It has repeatedly been urged in these notes that power and responsibility go together, and that where the influence of the Crown is supreme, the maintenance of a puppet throne ought not to blind even the Courts to the facts. Such kingdoms are in truth and in fact annexed and their people ought to be treated as what in fact they are, namely British subjects. Internationally, there is no doubt that they are such.

International law is not much troubled by fictions. And to alter the allegiance of a people by changing its constitutional relations with its suzerain is a cause of war if done in peace, and it would seem an improper exercise of hostilities in war. Practically, the only cause for complaint would arise if the Egyptian army and population were compelled to resist the British against Turkey. Such a step would be so impolitic that it is not likely to be taken. But the invasion of Egypt by a Turkish force would produce a situation of very great difficulty. Theoretically one is obliged to say that it would be internationally wrong to force Egyptian troops to repel them. The best justification would be to represent the recent action as a revolt, carried out by the Egyptian cabinet, and recognised by Britain. It is rather a withdrawn argument. Possibly the Crown really relies, as in 1901, on the right of conquest. As we have seen that is now a *de visu* inadmissible. And it would be very bad *de jure* to admit it. It need not be added that these remarks are not directed to questions of policy, but simply to state what is conceded to be the law. It may be policy to break the law. And then the question becomes one of ethics.

### 'The "Miramachi"—Pre-war Shipments.

The proper course was taken in this case of applying the principles of ordinary Commercial law to a question of property, where the shipment was made before the outbreak of war and not in contemplation of it. To other shipments the stringent doctrines of Prize law could be applicable, which decline to be satisfied with the usual presumption that property vests in the purchaser on shipment in cases where the shipper is an enemy; and which will scarcely admit of proof to the contrary, in cases where an enemy is the purchaser (though the accustomed course of trade varying the common rule may probably be invoked to save a cargo in such circumstances).

---

### The "Odessa"—Neutral Liens.

In *The Tobago*, Sir W. Scott laid it down that liens which were "private" (by which he seems to have meant non-apparent), such as bottomry bonds, could not be recognised on an enemy ship. Conversely, in *The Ariel* ([1856], 11 Moo. P. C. 119), the Privy Council declined to take any notice of an enemy's lien on a neutral ship. The application of the same principle to cargo was suggested as the proper course in these Notes last November. It has now been formally applied in *The Odessa* (December 21st 1913). The case is by no means covered by *The Ida* ([1854], Spinks, 26). There, Russians, who had no credit in Brazil, and wished to import coffee from thence, got a Hamburg firm of bankers to provide them with funds to pay with, and the bills of lading were made out in duplicate, one set (on board) being in blank, as on a voyage to Elsinore, in Denmark, for orders; the other set, forwarded to the bankers and indorsed to their order, was made out as on a voyage to Helsingfors, in Russia. War had not begun,

but was contemplated: and this duplication of papers was amply sufficient to condemn the cargo. Dr. Lushington went further, and held that the neutral bankers' asserted lien would be disregarded: but the obvious fraud which pervaded the whole shipment weakens the force of the case as an authority. ("The whole transaction is a disgraceful fraud"—per Harding, Q.A.) The case of the *Odessa*, however, raises the issue neatly of the effect, in the absence of all fraud, to be given to liens, and is no doubt right in denying any (*The Frances*, 8 Cranch, 418).

### Alien Enemies.

Decisions have been rendered in various quarters which proceed upon the principle that an enemy who is not expelled from the country, but is subjected to interment or registration, is here by licence, and is entitled to all the privileges of a British subject. This is completely contradictory to *Melior v. Smith* ([1812], 3 Camp.), and *Alsenius v. Nygren* ([1854], 4 El. and Bl. 217; 3 W. R. 25). In both of these cases, a suit by an alien enemy failed. The former of them is especially noteworthy, for the plaintiff had been subjected to a system of certificated registration not unlike that which exists to-day. It was held that she was not here by licence or safe-conduct. The *fons et origo* of the recent decisions appears to be an ancient and ill-reported case of *Wells v. Williams* (1 L. Raym. 282), which was taken up, without a full knowledge of the circumstances, by Kent, C.J., in *Clarke v. Morey* (1813. 10 Johns. Am. 69).

The fact is, that in *Wells v. Williams*, King William III had published a Declaration of War, in which French subjects were specially invited to remain, and promised every protection. No such intimation has been issued on the present occasion. The mistake of relying on the case as deciding a general principle, in the face of such recent

authority as *Alsenius v. Nygren*, has produced a great deal of confusion and uncertainty. Sargent, J., purported to rely on it when deciding that Princess Thurn and Taxis might sue on a libel (Oct. 16th 1914); and Lord Hunter supposed he was following him when in *Schulze, Gow & Co. v. Bank of Scotland* ([1914], 2 Sc. L. T. 455) he allowed a suit by an enemy for an account. The former decision might be justified, on the ground that a hostile alien who is merely permitted to remain must enjoy elementary protection for his person, property, and reputation, and may therefore bring actions of tort. The latter case certainly cannot be justified on any English principle. It has, however, been followed by the Court of Appeal in England (*Alien Enemy Cases*, Jan. 20th 1915).

The capacity of alien enemies to be sued was admitted in *Robinson v. Continental Iron Co. of Maynheim*, by Baillière, J.; Story ('*Equity Pleadings*', sect. 53) is strongly against such a possibility. It seems unfair that a person should be sued who has no means of communication with the country. The learned judge undertook to see that he sustained no injustice; but, with respect, that is scarcely sufficient. The only authority of any weight which was cited for the plaintiff was the decision of Swayne, C.J., in *McVeigh v. U.S.* (11 Wall. 259). But that was a decision in a Civil War case, where the parties were both in theory subject to the same allegiance, though one was temporarily resident in an area which for some purposes was being treated as at war with the Government. Lord Davey's third rule, in *Janson* (L. R. [1902], A. C. 499), was brushed aside as inconsiderate. In view of Story's strong doubts, and Lord Davey's unqualified words, it is far more probable that the enemy has no *persona standi in judicio*, and cannot be a defendant. The Court of Appeal, nevertheless, affirmed the decision.

A different question arises when the plaintiff is a corporation formed in the United Kingdom, but composed largely or entirely of enemy aliens. Lush, J., has decided in *Continental Tyre &c. Co. Ltd. v. Thomas Tilling Ltd.* (Nov. 23rd 1914) that such a company can sue. For the arguments *contra*, reference may be made to a leading article in the *Law Times* of Oct. 24th. The fictitious personality of a company cannot alter the fact that, in dealing with them, one is actually dealing with enemies (Cf. *S. P. G. v. Wheeler* [1814], 8 Cranch, 133). Subsequently to the decision very stringent powers were taken by the Government with respect to such companies. It was affirmed by the Court of Appeal, but Lord Justice Buckley, who is most familiar with the working of Company law, dissented.

### The American Note.

The Note presented to the British Government by that of the United States is dealt with in full elsewhere in this number by an abler pen. But the present writer cannot refrain from recording a firm opinion that the Note shows how far the true principles of Prize law have become obscured. The Ambassador complains of a multiplicity of seizures on suspicion. But the idea of seizure on suspicion is a distinctively American notion. It is laid down in the celebrated Report of Lee, Paul, Ryde & Murray (Mansfield), made in 1753, that it was the practice, even then immemorial, of Europe, to condemn or investigate only in cases where the ship's papers and depositions are imperfect or contradictory. This immemorial practice was the common practice of all maritime countries. It was communicated thus such by Stowell to Jay and Story in America, in 1794, and never departed from by the American Supreme Court.

That Court then, attending to extraneous matter, affected to determine that voyages were contraband according to the assumed ulterior destination of the cargoes. It thus introduced a *régime* of suspicion which was well summed up by Sir T. Twiss in a remarkable paper in this Magazine (Vol. III, 1877-8, p. 1—see also *L. M. & R.*, 1870, p. 85), as calculated to extend the evils of war to every sea. The theoretical support which the novel doctrine receives from Calvo and Halleck is based upon a *dictum* of Story's, to the effect that cargoes which are "destined" for the use of the enemy's armed forces are always contraband (*The Commerce* [1816], 1 Wheat. 382). Read with the context, this only means that a voyage to a country occupied by the enemy's forces is a voyage to an enemy country. It does not affect the principle, that contraband can only be captured in the direct prosecution of a voyage to a hostile port:—*i.e.*, that a plain fact and not a disputable intention, must be the foundation of interference with a neutral ship. If the new doctrine of the American cases be admitted—if the ancient Prize principles are discarded, and vessels are tried as Phillimore and Twiss agree they should not be tried on Common-Law principles, delay for the investigation of suspicions, and for the getting-up of cases, becomes proper and necessary, and Americans should be the last to protest against it.

There are, of course, cases in which the very nature of the cargo is not conclusively established either way by the ship's papers: and in such cases it is right and proper that they should be brought in for examination. For example, a cargo described as hemp, may be fit for naval use, or mere cordilla of poor quality. Such a cargo needs skilled examination (*The Jonge Hermanus*, 4 C. R. 95 n.). But that is a very different thing from bringing the ship in to look for something which captors suspect is there.

### The "Roumanian"—Seizure on Land.

During the Crimean War, the public became familiar with an odd phenomenon, of which no single instance had occurred in the French Wars, namely, the capture of ships by Custom-house officers. It may be conjectured that the forcible seizure of the merchantman of earlier days was too hazardous an enterprise to be so tamely accomplished. The only precedent which could be furnished to Dr. Lushington for seizure by anyone unconnected with the Navy, was a case of a capture effected by an officer in the Fife Light Dragoons. Nevertheless, in the days of the Crimea, the system of capture by Customs officials became frequent and regular. It does not appear, however, that they ever effected captures on land; and the question whether such a capture on land is cognisable by a Prize Court, came before the Prize Judge the other day (*Times*, Nov. 7, 1911) in the case of *The Roumanian*.

"Whatever is the property of the enemy," say the authors of the celebrated Report on Admiralty Jurisdiction of 18th January 1753, "may be acquired by capture *at sea*." Prize is normally made of property afloat. Only one exception seems to exist, property captured on shore by the direct interposition of naval force. If property on a quay-side or wharf was also properly to be included, there is no doubt that some record of the fact would be found in the reports. Stowell's definition of prize is absolutely on all-fours with Wheaton's. "I know no other definition of prize-goods than that they are goods taken on the high seas, *jure belli*, out of the hands of the enemy . . . . Such goods, when they come on shore, may be followed by the process of the Court" (*The Two Friends* [1799], 1 C. R. 282). The curious exception of goods taken on land by naval force rests on the authority of *Lindo v. Rodney* (2 Douglas, 614—note to *Le Caux v. Eden*). In that case, Lord Mansfield showed himself

impressed by the material advantages of entrusting the determination of the question to a tribunal accustomed to deal with such matters, and conceded the jurisdiction to the Prize Court. (Of course, the Admiralty may be entrusted with the determination of the way in which the Crown shall distribute its favours: as in the *Banda & Kirwee Boot Case*). In *Brown & Burton v. Franklin*, K.P. (10 Will. III, Carthw., 474), the plaintiffs, masters of two East Indiamen, had made an expedition to attack a French ship (the *Francis*) outside the King's dominions. They found her a wreck, and plundered her, and then took from the crew, on land, 6,000 sequins. The other booty comprised "200 elephants' teeth, 300 pieces of muslin, 300 pieces of calico, &c." The King's Proctor obtained a sentence of condemnation as droits of Admiralty (the scene of action not being on the high seas), and proceeded to press the plaintiffs for an account. They moved for a prohibition. It was denied. The question of "Prize or No Prize" was one for the Admiralty. Here, the capture was by direct naval force (East Indiamen) and was outside the King's dominions. In *Key & Hubbard v. Pearce* ([1712], Doug., 606), the capture was within the dominions, but the ship was afloat. The *Canary Merchant* was seized by H.M.S. *Hamburg* as Spanish property "within the body of the [British] city of New York." It was urged that a ship taken in that situation was not taken "on the sea." But it was held that the jurisdiction of the Admiralty Court was not excluded: the case being one of "Prize or No Prize." Lee, C.J., observed:—"The jurisdiction of a Court of Admiralty is generally limited to matters arising *ad alium mare*. . . . Yet I do not take it to be so in cases of prize: for the jurisdiction does not depend on locality, but on the nature of the question, which is such as has to be tried by any rules of the Common law, but by a more general law, which is the Law of Nations."

We have thus arrived at this position, that the Admiralty has jurisdiction whenever the capture was made (1) of things afloat, (2) or by naval force without the realm. Can we go further, and say that it ousts the Common-law Courts, in disposing as to the status of chattels deposited on *terra firma* under the aegis of the Common law? The judge in *The Roumanian*, held that we can, though he set no certain or definite (or indeed any) limits to the doctrine. But it is permissible to entertain serious doubts. His Lordship did not try to distinguish the case of *The Ooster Ems*, except by remarking that it was distinguishable. Now, in *The Ooster Ems* ([1799], 1 C. R. 284) the Lords' Delegate definitely disclaimed Admiralty jurisdiction over things landed. A ship was stranded on the Goodwins. The cargo was sent on shore, and there claimed as a perquisite within the jurisdiction of the Cinque Ports, in the Cinque Ports Court. A writ of mandamus issued from the Admiralty to remove the cause into the High Court of Admiralty, and the goods were there condemned as prize. The decree was reversed on appeal, when it was resolved: "that the High Court of Admiralty had not a jurisdiction over the goods seized and proceeded against. There was no act of capture on the high seas, and therefore they were not to be considered as prize" (per Sir W. Scott in *The Two Friends*, [1799], 1 C. R. 282). Nor can they have been considered as droits of Admiralty, for they would have been equally cognizable by the Admiralty Court, if they had been. It is true that *The Hornung* and *The Charlotte* are not very much in point. In both the goods had been landed, but in neither were they available for seizure *in specie*. In *The Hornung* the goods had been sold to satisfy a claim of the captors, and the attempt was made to make the ship seizable in their place. In *The Charlotte* the goods had been landed, and others bought with the proceeds; the attempt was to put these latter in their place and seize them. Both attempts failed,—but the cases are obviously very different.

from the case of the seizure of specific enemy goods. But it is difficult to get over *The Ooster Ems*, as interpreted in *The Two Friends*, added to the cumulative force of Wheaton and Story's deliberate statement, and the negative results of Stowell's practice. Much irrelevant learning was expended in *The Roumanian* on the proper interpretation of the term "port"—apparently on the assumption that all enemy's property within the limits of a "port" are droits of Admiralty and cognizable by the Admiralty Court. It is true that the distinction between prize (which went to captors) and droits of Admiralty (which went to the Crown in Admiralty) is, broadly, that prize is taken at sea and droits in ports and harbours. But to come within the Admiralty jurisdiction at all, under either denomination, it is submitted that property must be found afloat (or else captured abroad by naval force). Droits of Admiralty in enemy goods are nothing but a particular description of prize.<sup>1</sup> In the Japanese case of *The Thalia* (Takahashi, p. 105) the capture was effected by a naval officer. In *Brown v. U.S.* (8 Cranch, 144) the timber was afloat. The Judge in *The Roumanian* quoted some MS. cases vouched for by Mr. Rothery; one, *The Marie Anne*, was the case of a ship in dry dock and its temporarily landed cargo, as to which the Admiralty jurisdiction might be supposed (as it was in *The Thalia*) to have some inherent appropriateness; the other was a case as to which the learned President admitted that it was not stated whether the portion of the cargo which had been landed was condemned at all. These seem slender grounds for extending the jurisdiction of the Prize Court to dry English land and the chattels thereon, in the face of *The Ooster Ems*. The proper course when goods on land are alleged to be forfeited to the Crown is, it is submitted, to file a Latin information of *devenirent* in the King's Bench. The prac-

<sup>1</sup> See Wheaton, *Captures*, 33; the *Marie Francaise*, 6 C. R. 28.

tical objection to this course is said to be that this is to admit that the goods are on land, and that their seizure is consequently contrary to modern practice in war. But, if they are in fact on land, condemning them in a Prize Court instead of the King's Bench will not alter the facts. It is equally obvious that very great inconvenience and confusion may ensue from the co-existence of rival Prize and Common-law jurisdictions over wharves and quays; therefore, *The Roumanian* is scarcely satisfactory, and may well be reconsidered in the Privy Council. No case appears to have occurred in the Crimean war of the seizure of goods which have been landed. It may often be the case, however, that the true seizure takes place afloat: *i.e.*, when the ship comes under the orders of the Admiralty. If, for instance, cargo was put ashore by naval directions, it might be considered seized, unless delivered up to owners (*The Edward and Mary*, 3 C. R. 305). And *The Roumanian* may be upheld on this ground.

T. BATY.

---

## VIII.—NOTES ON RECENT CASES (ENGLISH).

BEFORE the Judicature Act, the division of the jurisdictions of Equity into exclusive, concurrent and auxiliary, was regarded as of the first importance. Since that Act many lawyers seem to have altogether forgotten this division, while others seem to think that it has become obsolete and useless. It is true the Judicature Act has rendered the auxiliary jurisdiction obsolete and useless; but as we have over and over again insisted in these pages, it has left the division between the exclusive and concurrent jurisdictions untouched, and the failure to recollect this has often resulted in erroneous, and in the misunderstanding of correct, decisions.

The reason of this is, that the distinction between the auxiliary and the other jurisdictions of Equity was based on procedure, while the division between the exclusive and concurrent jurisdictions was based on principle; and the Judicature Act revolutionised procedure, but did not alter principle. The principle on which the division between the exclusive and the concurrent jurisdictions was based was and is this, that in matters coming within the exclusive jurisdiction both the cause of action and the remedy are equitable, while in matters coming within the concurrent jurisdiction the cause of action is legal, and it is only the remedy which is equitable. Accordingly, before a plaintiff can get an equitable remedy in a matter within the concurrent jurisdiction, he must show that a wrong has been done him for which a Common-law Court would grant him a legal remedy; while if the matter is one coming within the exclusive jurisdiction, all he has to show is that a right recognised in Equity, though not in Courts of Common law has been invaded by the defendant. It was the failure to remember the former of these principles which led to the erroneous decision of the Courts below in *Colls v. Home & Colonial Stores Ltd.* (L. R. [1904], A. C. 179). It was the failure to remember the latter, which led to the misunderstanding by the same Courts of the correct decision in *Derry v. Peek* (L. R., 14 App. Cas. 337).

The decision in *Derry v. Peek* (*supra*) was unquestionably correct, assuming that the matter before the Court was as Cotton, L.J., said it was (see L. R., 37 Ch. Div. p. 565), an action for deceit—"a mere common action"—(which is a large assumption), and therefore within the concurrent jurisdiction of Equity. To succeed in a Common-law Court, previous to the Judicature Act, the plaintiff would have had to prove not merely that the defendant had made a false statement to the plaintiff

out had made it, to put it shortly, with a wicked mind. Accordingly, where an action based on Common-law deceit was brought in the Court of Chancery, this had to be proved before any equitable remedy could be given; and all those cases in which the decision of the Court was based on "constructive fraud," that is, on negligence so gross as to induce the Court to treat the defendant as if he were guilty of fraud, although it is admitted that, in fact, he is not so guilty, are, when the sole ground of action is Common-law deceit, plainly erroneous. But in matters within its exclusive jurisdiction Equity took a very different view of the extent of a defendant's liability for false statements made by him from that taken by the Common law. Thus, where a contract was shown to have been brought about by a material misrepresentation, it granted rescission, however innocently the misrepresentation had been made. Moreover, outside contracts, Equity constantly imposed a duty on parties, where the law imposed *nonc*, to act or speak with reasonable care; and if they failed to do so, held them liable for the consequences precisely as if they had acted or spoken fraudulently. This is always the case where a fiduciary relationship exists between the parties, as in the case of trustee and *testum que trust*, guardian and ward, parent and child, solicitor and client. But it also exists sometimes where there is no such relationship as between a purchaser of land and persons having equitable claims against it. Here, Equity imposes a duty on the purchaser to make reasonable inquiries before purchase to ascertain whether any such claims exist; and, if he fails to do so, holds him liable as if he had notice of them. In all cases—even in the last mentioned—where Equity imposed the duty of care, negligence was usually described as "fraud" or "equitable fraud." This name may be due, as the Lord Chancellor suggests in *Nocton v. Lord Ashburton* [L.R. [1914], A. C. 932, at p. 956], to the fact that what

is now, contractual liability was originally based on tort, or (which appears to me more likely, for the principle is by no means confined to contractual liability) to the fact that, as Mr. Ashburner points out (*Principles of Equity*, p. 87), Equity "originally disclaimed all right of affecting a legal title except in cases of trust, fraud and accident."

*Nocton v. Lord Ashburton* (*supra*) is an admirable example of equitable as compared with actual or Common-law fraud. There, shortly, a solicitor advised his client to release part of a mortgage security in which the solicitor himself was interested. The result of following this advice was that the security became insufficient and part of the mortgage money was lost. The client sued the solicitor for the loss, and alleged fraud as the ground of relief. Neville, J., while holding that the solicitor stated what was not true, and, in advising as he did, fell far short of his duty as a solicitor, found that there was no actual fraud proved and dismissed the action. The Court of Appeal reversed the finding on the ground that actual fraud was proved. The House of Lords agreed with Neville, J., that there was no actual fraud, but affirmed the decision of the Court of Appeal on the ground that there was equitable fraud, the solicitor having negligently failed to ascertain the truth of the representations which he made to the client when in equity it was his duty, in view of the fiduciary relation between solicitor and client, to ascertain this before advising his client.

Talking of the use of the term "fraud" in equity, the case of *In re Holland*, *Holland v. Clapton* (L. R. [1914], 2 Ch. 595), is very much in point. There Sargent, J., laid it down that where an appointment under a special power was not really for the benefit of the appointee but for the benefit of someone not an object of the power, the appointment was void as a "fraud" on the power; but where

the appointment was substantially for the benefit of the appointee, with conditions benefiting someone not an object of the power, the appointment was not a "fraud" on the power and was good, but the conditions were void.

Is Neville, J., right in holding, as he did, in *E. W. Savory Ltd. v. The World of Golf Ltd.* (L. R. [1914], 2 Ch. 566), that where a person has inadvertently infringed another's copyright, and the infringer on being made aware of the infringement has undertaken not to repeat it, the owner of the copyright in action brought is entitled to an injunction? It has hitherto been thought by us that injunctions are granted only where there is a threatening or a likelihood that the offence will be repeated, especially when the defendant when he did the act was not aware that he was invading the plaintiff's right. How can you enjoin a defendant from doing what he is not doing and has undertaken never to do? Perhaps his lordship might have come to a different decision had his attention been called to *Behrens v. Richards* (L. R. [1905], 2 Ch. 614), and *Tunnicliffe & Hampson v. West Leigh Coal Co.* (L. R. [1908], A. C. 27).

A large part of the law as to the administration of assets is, as everyone knows, in a state of chaos; but, even so, it is amazing to find how much uncertainty still prevails as to the extent of an executor's right to retain, rememnbering that this right has existed for centuries. The latest decision on the point is *In re Mary Caroline, Dowager Duchess of Sutherland, Michell v. Burne (Countess)* (L. R. [1914], 2 Ch. 720). In it, it has been decided by Joyce, J., that where an executor is a beneficiary under a trust, he cannot retain a debt owed by the testator to his trustees. This is the view lawyers have long been inclined to take, but it was difficult to maintain it in the face of some of the earlier decisions.

We have several times referred to the beauties of drafting as displayed in our Acts of Parliament. Two cases reported this quarter show these in the finest light. The first is *Lumsden v. Commissioners of Inland Revenue* (L. R. [1914], A. C. 877), where the House of Lords has held that sects 1, 2, and 25 of the Finance (1909-10) Act 1910 mean what the Chancellor of the Exchequer admits they were never intended to mean. The second is *Bodega Company Ltd. v. Read* (L. R. [1914], 2 Ch. 757), where the Court of Appeal has held that sect. 2 of the Finance Act 1912 is drafted in such a way as to render it in most cases absolutely abortive.

J. A. S.

The case of *R. Leslie (Ld.) v. Sheill* (L. R. [1914], 3 K. B. 607) decides that an infant borrower who fraudulently represents to the lender that he is of full age may keep the money so obtained by fraud. The decision is probably correct, as it is the result of a considered judgment of the Court of Appeal, consisting of Lord Sumner, Kennedy, L.J., and A. T. Lawrence, J. Still it is an unpleasant reading, and gives rise, at least, to the doubt whether protection to infants is not being carried too far, when such protection enables them to practise fraud with immunity from legal or equitable claim, and so to keep the plunder. The Infants' Relief Act 1874 makes all contracts entered into by infants for the repayment of money lent or to be lent absolutely void. Therefore, no action could be brought on a contract for repayment. And "so long ago as *Johnson v. Pye* (1 Sid. 253) it was decided that, although an infant may be liable in tort generally, he is not answerable for a tort directly connected with a contract which, as an infant, he would be entitled to avoid" (per Lord Sumner, p. 611). But Horridge, J., in the Court below, decided in favour of the lender, giving effect to the rule which has up to now been supposed to exist in equity, that "where an infant has induced persons to do

with him by falsely representing himself as of full age, he incurs an obligation in equity which however, in the case of a contract, is not an obligation to perform the contract and must be carefully distinguished from it" (*Pollock on Contracts*, 8th Ed., p. 79). Lord Sumner, in his judgment, says that "this rule in equity has been so stated at times by text-writers, both remote and recent," but he adds, that "of authority for it, there is very little." There are certainly numerous authorities for the proposition which has, at least, a sound ring that "infants are no more entitled than adults to gain benefit to themselves by fraud" (per Turner, L.J., *Nelson v. Stocker*, 4 D. G. & J., at p. 464). As Lord Sumner remarks, in the judgment now under consideration, "the infant succeeded in deceiving some money-lenders by telling them a lie about his age, and so got them to lend him £400 on the faith of his being adult," and he adds, "perhaps they were simpler than money-lenders usually are, perhaps the infant looked unusually mature." At any rate, as a result, the Court of Appeal has held that an infant is entitled to gain a benefit which he has secured by telling a lie. The rule, however, that an infant cannot retain an advantage obtained by his own fraud, has been laid down in several cases cited and dealt with in the case now under consideration, in *Pollock on Contracts*, and in other text-books. This rule has also been acted on in bankruptcy, where it has been held that "persons who had been defrauded by the bankrupt when under age, and thereby induced to lend him money, had a claim on his assets, not against him personally, which was available in competition with creditors in the full sense of the word." (Lord Sumner, p. 616, commenting on *In re King*, 3 D. G. & J. 65.) Lord Sumner says that *In re King* "does not govern the present case, but it must be admitted that the language of the Lords Justices is hardly consistent with any other view than that the bankrupt was in equity personally

liable to pay the debt." He further says that, "Jessel, M.R., thought the decision anomalous and one not to be extended; see *ex parte Jones*" (L. R. [1881], 18 Ch. D., pp. 120, 121). But Jessel, M.R., in this case expressly stated that he did not wish to be supposed to "over-rule the decisions in Courts of Equity where an infant has committed a fraud, by representing that he was not an infant and so obtained money or goods" (pp. 120, 121). Assuming that this decision of the Court of Appeal is correct (as must, of course, for this purpose be assumed), the supposed doctrine in equity by which restitution was secured, and fraud defeated, is negatived, and both there, and at Common law, a lying infant may, by his false representations as to his age, obtain money or goods and keep them, and, moreover, will probably (as in this case) recover the costs of an action (less the costs of the issue of fraud) brought against him, in the endeavour to obtain from the rogue the money or goods he has fraudulently obtained. The case is worthy of careful perusal as well as the numerous cases cited in it.

The Court of Appeal gave an important judgment in the cases of *Ryan v. Oceanic Steam Navigation Company (Ld.)*, *O'Connell v. Same*, *Scanlon v. Same*, *O'Brien v. Same* (L. R. [1914], 3 K. B. 731). These cases arose out of the loss of the *Titanic* on a voyage from Queenstown to New York, when she collided with an iceberg and sank. The jury, before whom the cases were tried, found that this casualty was the result of negligence on the part of the defendants' servants. The defendants relied on a condition on the back of the "Steerage Passengers' Contract Tickets," exempting the defendants from the consequences of neglect or default of the ship-owners' servants. This condition had not been approved by the Board of Trade. By sub-sect. (2) of sect. 320 of the Merchant Shipping Act 1894, such a contract ticket is required to "be in a form approved by the"

Board of Trade and published in the *London Gazette*, and any directions contained in that form of contract ticket, not being inconsistent with this Act, shall be obeyed as if set forth in this section." The form approved by the Board of Trade contained a "direction" that "a contract ticket shall not contain on the face thereof any condition, stipulation or exception, not contained in this form." It was held by Vaughan Williams and Kennedy, L.J.J. (Buckley, L.J., dissenting), affirming the decision of Baillhache, J., that the condition, exempting from the consequences of negligence of the defendants' servants, not having been approved by the Board of Trade, was invalid, and therefore, the defendants were not entitled to the benefit of any such exemption.

In the case of *The Charing Cross Electricity Supply Company v. Hydraulic Power Company* (L. R. [1914], 3 K. B. 772), the plaintiffs were the owners of electric cables laid under public streets. The defendants were the owners of hydraulic mains which had been laid under the same streets, under statutory powers. These mains burst in four different places, in each case damaging the plaintiffs' cables. The bursting of the mains was not due to any negligence on the part of the defendants. Two of the mains which so burst had been laid under a private Act which did not contain the usual clause, providing that nothing in the Act should exempt the Company from liability for nuisance. The other two had been laid under a later Act which did contain such a clause. The later Act also provided that the two Acts should be "read and construed together as one Act." The Court of Appeal held (1) that the doctrine of *Rylands v. Fletcher* (L. R. [1868], 3 H. L. 330) applies, not only to cases in which the dangerous thing has escaped from the defendants' land on to the plaintiffs' land and done damage there, but also to cases in which the site of the plaintiffs' injury was occupied by him only under a licence and not

under any right of property in the soil, and that in the absence of statutory authorisation of the nuisance, the defendants were liable for the damage caused by the bursting of the mains, notwithstanding that they had been guilty of no negligence. *Midwood v. Manchester Corporation* (L. R. [1903], 2 K. B. 597) followed. (2) That the effect of the two Acts being read together as one Act was, to take away the privilege which, down to the passing of the later Act, the defendants had enjoyed, in respect of the two first-mentioned mains, of not being liable for damage done by their bursting in the absence of negligence, and that consequently, in the case of all four of the mains, the defendants were liable as for a nuisance.

The head note in *Higgins v. Beauchamp* (L. R. [1914], 3 K. B. 1192) seems accurately to represent the effect of the judgment subsequently reported. But is not the statement too general? The head-note is, "A firm carrying on the business of cinematographic theatre proprietors is not a trading firm for the purposes of the rule that each member of a trading firm has implied authority to borrow money on the credit of the firm for partnership purposes." The decision may be right in the absence of evidence as to usual course of business. But it would seem that a little evidence given at the Bath County Court on the subject would have shown that borrowing money was at times an ordinary incident of such a concern, so as to bring the case within sect. 5 of the Partnership Act 1890, which enacts that "Every partner is an agent of the firm, and his other partners, for the purposes of the business of the partnership, and the acts of every partner who does any act in carrying on in the usual way business of the kind carried on by the firm of which he is a member, bind the firm and his partners." In this case, under the partnership deed, the business was that of proprietors and managers of picture

palaces, cinematograph theatres, and exhibitions, variety entertainments, concerts, theatrical performances, and all other forms of entertainment. Might not procurement of a loan be an act done "for carrying on in the usual way" such a business? Does not Mr. Justice Lush take too limited a view when he says, "A trading business is one which depends on the buying and selling of goods. At any rate, I am satisfied that this particular business is not a trading business"? If it is not, what is it? Moreover, it is not necessary that it should be a trade or trading business. It certainly was a "business." That is, so far, enough for sect. 5 of the Partnership Act.

In *The King v. Sagar*, (L. R. [1914], 3 K. B. 1112) the prisoner was charged with having obtained goods by false pretences. The false pretence alleged in the indictment was, that he had pretended that he was carrying on a genuine and *bona fide* business as a manufacturer's agent and merchant. It was held that receipts sworn to by the prisoner, as having been given to him as acknowledgments of payments for goods purchased by him, other than those the subject of the charge, and entries in his bank pass-books showing payments made by him for goods supplied to him, were admissible as evidence on his behalf that he was in fact carrying on a genuine and *bona fide* business. This evidence having been excluded by the learned judge at the trial as irrelevant to the issue, the Court of Criminal Appeal quashed the conviction.

J. H.

### SCOTCH CASES.

The reported decisions of the Scots Courts during the last three months are not numerous, and few of them of general interest. The war with its attendant

legislation has been responsible for a group of cases of which '*Orenstein & Koppel v. The Egyptian Phosphate Co. Ltd.* ([1914], 2 S. L. T. 293) is the most important. A German company sued a Scotch company for sums which they alleged to be due under a contract. The pursuers desired that the action should proceed in ordinary course, and they maintained that they had a branch in this country, and that the contract in question was made with that branch and thus fell under the exception to the prohibition of trading with the enemy, contained in sect. 6 of the Royal Proclamation of 9th September 1914. The pursuers were manufacturers of railway plant and rolling stock, their works were in Germany, and their manufacturing business was wholly carried on there; but they had an office in London which was carried on by a manager who had full power to enter into contracts, and to raise and defend legal proceedings in this country, and they were registered under the Companies Act of 1908 as a foreign company trading in the United Kingdom. Three of the four judges forming the Court (the Lord President, Lord Mackenzie, and Lord Skerrington) held that the London office was not a branch in the sense of the Royal Proclamation, that the contract fell under the prohibition of trading with the enemy, and that proceedings in the action must be stayed (in the Scotch phrase "sisted"). Lord Johnston held that the payment of money arising out of a transaction was not a transaction in the sense of the Proclamation, and that such a payment to an enemy was prohibited even if he had a branch in the United Kingdom. This view (in which the Lord President intimated that he concurred) necessarily led to the same result, as the only question in the case was the liability or non-liability of the defenders to pay a sum of money to the pursuers.

Where a Scottish School Board resolves to dismiss a teacher, the Education (Scotland) Act 1908 enacts that the Scottish Education Department, if after inquiry they are of opinion that the dismissal was not justifiable, shall communicate their opinion to the School Board, and, if the School Board do not depart from their resolution, the Department may attach to it the condition that the Board shall pay a sum of money to the teacher. In the case of the *School Board of the Parish of Dalziel v. the Scottish Education Department* ([1911], 2 S. L. T. 449) the pursuers (the School Board) had dismissed a teacher, as from 30th April 1912. Thereafter they received various letters from the secretary and the assistant secretary of the Department, which intimated that the Department were of opinion that the dismissal was not justifiable, and that in virtue of their powers under the Act of 1908 they attached to the resolution of dismissal a condition that the School Board should pay to the teacher a sum equivalent to three months' salary. The School Board then brought an action in which they craved a declaration that the letters of the secretary and the assistant secretary did not proceed upon and were not authorised by any decision of the Department and were ineffectual. It was common ground that the Scottish Education Department was a Committee of the Privy Council, and that from 1909 to the date of raising the action it consisted of seven persons who were mentioned on record, including the Secretary for Scotland as Vice-President. The pursuers averred that this Committee had never met since the date of its appointment. In defence, the Department stated that since its constitution its business had been conducted by the Secretary of the Department, acting under the directions of the Vice-President, that the letters received by the pursuers were written by the directions and under the authority of the Vice-President, and that the decisions intimated by them had been taken by the Vice-President.

The Court held, in the first place, that the statements, if true, formed a good defence to the action, that it was competent for the Department to delegate the conduct of their business to the Vice-President, and that the decision of the Vice-President was the decision of the Department. Lord Dundas observed that the statute which constituted the Department (the Education (Scotland) Act 1872) left the Department a free hand as to the methods by which they might conduct their business, and that these methods were not subject to challenge and investigation in the Courts provided they were not contrary to their statutory powers or to the elementary principles of justice and fair dealing.

The Court further held that the defenders being a Government department, their statements must be accepted as true unless they were specifically denied by the pursuers, and in the absence of a specific denial, they found themselves able to throw out the action on the record without sending it to trial.

The decision on the above point is in line with the decision of the High Court of Justiciary in *Stevenson v. Rogers* ([1914], 2 S. T. 406). In that case the manager of a mine was charged with contraventions of the Coal Mines Act 1911. The statute provided that no prosecution should be instituted without the consent of the Home Secretary in writing. The complaint was at the instance of the Procurator Fiscal (who represents the Lord Advocate as public prosecutor), and bore that it was brought with the consent of the Home Secretary. The accused pleaded that a document produced was not sufficient evidence of the consent required by the statute. But the Court held that evidence was unnecessary; and that it was sufficient if the Lord Advocate or one of his representatives (whether in the Supreme or in the inferior Courts) stated to the Court that the Lord Advocate had the consent of the Secretary of State to the prosecution.

An unusual case is *Wallace v. Bergius* ([1914], 2 S. L. T. 430), where a motor car which at the time of a collision was on the wrong side of the road was held to be blameless and the car which was on the right side was held to be alone in fault. When the cars were approaching each other, both of them were travelling on the north side of the road—the speed in each case being about twenty miles an hour. The north side was the right side for the defender's car and the wrong side for the pursuer's car. When the cars were about thirty yards apart, the defender's car swerved to the south (its wrong) side of the road, and, about the same time, the pursuer's car swerved to the south (its proper) side, and it was on the south side of the road that the collision took place. The Court held that the driver of the defender's car had reasonable grounds for believing that the driver of the pursuer's car intended to continue on his wrong side of the road, and could not be blamed for attempting at the last moment to avoid a collision by swerving to the other side. In substance, the Court applied to the case the principle (which has long been familiar in cases of collision at sea) that where a party who is primarily at fault has, by his own wrong doing, put the other party in a position of danger and forced him to act in an emergency, he is not entitled to plead fault against the other party merely because he has not taken the best possible course in the emergency. Lord Dundas observed that, while decisions in nautical cases must not be rashly applied to incidents of the road, there was no reason why the fundamental considerations of good sense and fairness which underlie the one class of case may not also apply to the other.

In *M'Taggart v. William Barr & Sons, Limited* ([1914], 2 S. L. T. 430), the appellant, a workman, obtained a medical certificate that he was disabled from work, owing to

miner's nystagmus, on 26th March 1914. He had worked with the respondents from 15th May to 11th July 1913. On that date he was injured, and thereafter he did no work until the date of disablement. In these circumstances, the arbitrator, under the Workmen's Compensation Act, held that the onus was on the workman to prove that the disease was due to the nature of his employment with the respondents within the year preceding the date of disablement, and, on the evidence, that that onus had not been discharged. The question of onus turned on sect. 8 (2) of the Act, which (when taken along with the Third Schedule to the Act and the orders of the Secretary of State) enacts that where the workman "at or immediately before" the date of disablement by miner's nystagmus was employed in the process of mining, the disease shall be deemed to be due to the nature of the employment unless the employer proves the contrary. As the workman had ceased working eight months before the date of the disablement, it was not easy to maintain that he was employed "at or immediately before" the disablement. It was, however, strenuously argued that the words "immediately before" referred not to sequence of time, but to sequence of employments, and included the last employment of the workman in the process of mining, however distant it might be, provided it was within the year. This argument was rejected by the Court, and it was held that the statutory presumption did not apply, and that the workman could not succeed unless he proved affirmatively that his disease was due to the nature of his employment with the respondents. The decision is in accord with the English case of *Dean v. Rubian Art Potteries, Limited* ([1914], 2 K. B. 213), although in one sense clearer, because in *Dean's Case* the interval between the last employment in the noxious process and the disablement was only four weeks. On the other hand, the workman in *Dean's Case* had in the interval obtained work

of a different kind from other employers, so that the argument maintained for the appellant in *M'Taggart's Case* was not open.

J. S. M.

### IRISH CASES.

The current of authority as to the validity of gifts for the benefit of monastic communities shows some change. A generation ago, such a case as *In re Greene* ([1914], 1 Ir. R. 305), would probably have been differently decided. When cases turn upon notions as to public policy, or as to "the policy of a statute," modifications in popular sentiment and even changes in judicial personnel do produce an effect upon the decisions.

The statute is the Roman Catholic Relief Act (10 Geo. 4, c. 7), which imposes penalties upon the admission of persons into a monastic order in the United Kingdom, and (by sect. 29) makes it a misdemeanour for a member of such an order to come to or be within the kingdom. In the present case a testator gave part of his residue for "the decoration and improvement of the church of the Carmelite Fathers" in Dublin. That is admittedly a society bound by monastic vows; but the Court held that there was a valid charitable bequest not void under the Act. In coming to that conclusion, the Master of the Rolls had to consider a number of Irish cases, from *Carbery v. Cox* (3 Ir. Ch. R. 231) to *Cussen v. Hoyne* ([1906], 1 Ir. R. 539). Most of these had already been considered by Joyce, J., in *In re Smith* ([1914], 1 Ch. 937), a decision which encouraged the Master of the Rolls in approaching afresh a question which had been assumed, perhaps hastily, to be concluded by authority. Put briefly, the leading points in his judgment were these: a bequest of this kind is in itself charitable, and if it is to be held invalid, that can only be because the

church is the property of a monastic community. The Roman Catholic Relief Act only intended to subject members of such communities to the specific criminal penalties which it imposed, and not to other unspecified penalties in the shape of civil disabilities. Such members may be appointed to administer a charity, if the charitable object itself is lawful, as for example, the object of affording the means of public worship. It is not the policy of the statute absolutely to disable monastics from acquiring property.

Of course, any Court which has to consider this matter at the present day must be influenced by the fact that the penal prohibitions of the statute have for many years been allowed to become a dead letter. The indirect enforcement of a statute which is not directly enforced is not an agreeable sort of judicial action. No doubt, however, a gift directly intended to promote the admission of persons into such an order, or directly for the support of its members, must still be held void.

It is curious that there had been no earlier decision of the net point which arose in *Hamilton v. Clancy* ([1914] 2 Ir. R. 514). A telegram is handed in to a sub-postmaster at a branch office; he has to telephone its contents to a main-line office, whence they are telegraphed in the ordinary way. He is negligent in sending the telephonic message, so that a wrong figure gets into the telegram, and the sender thereby suffers damage. Is the sub-postmaster liable to the sender? The telegram-form contained the usual condition that the Postmaster-General would not be liable for loss caused by mistake or default; anyhow, *Whitfield v. Le Dancer* (2 Cowp. 745) decided long since that no action lies against the Postmaster-General for his servant's negligence. But the Court were of opinion that the sub-postmaster,

transmitting the telegram, was acting as a public officer, and in the discharge of a public duty, and that therefore his negligence did give the sender a right of action against him personally. "The very fact that his superiors are not responsible distinguishes the case from mere private agencies, and lets in the doctrine of the subordinates' personal responsibility." The newest authority was another eighteenth-century case—*Rouenning v Goodchild* (2 W. Bl. 906)—on the refusal of a postmaster to deliver a letter except on payment of an illegal charge.

In *Jackson v Walter* ([1914], 1 H. R. 378) we have a neat illustration of certain well-known principles: that in innocent misrepresentation neither gives the prisor deceived any right of action for damages, nor any right of rescission after conveyance. Bonds of a company having property in America were purchased on the faith of a representation that the bonds were a charge on that property. In fact they were not, but the representation was made innocently. The transaction having been completed by a legal transfer of the bonds, the Court refused to set it aside. Two circumstances only will enable a purchaser in such a case to obtain rescission after the property has been conveyed to him. One is fraud: *Wilde v Gibson* (I. H. L. C., at p. 632). "If a conveyance is executed, a Court of Equity will set it aside only on the grounds of actual fraud." The other is total failure of consideration; that is, that the purchaser does not get the substantial thing which he bargained for. Here he wanted bonds, and he got bonds; they were not so good as he thought, but still they could not be said to be a totally different kind of thing from what he expected.

Cases upon the effect of the *moratorium* are, it may be, dropped, of only passing interest; but the Irish Courts, like

the English, had much to do with it while it lasted. The leading Irish decisions are grouped under the heading of *Gramophone Co. v. King* ([1914], 2 Ir. R. 535), and were certainly severe upon a plaintiff who, often inadvertently, had issued a writ in a "moratorium case," while the period of delay was running. The attitude of the King's Bench Division was, that that was a period of "statutory credit"—not a mere postponement of payment but a postponement of the debt. Hence a plaintiff was not entitled to judgment, even though the defendant entered no appearance; and on the facts being brought before the Court it would either dismiss the action or take the writ off the file. If judgment had been inadvertently marked in the office, the Court would set it aside without obliging the defendant to institute a motion for that purpose.

---

It was decided in *Volkh v. Rotunda Hospital* ([1914], 2 Ir. R. 543) that an alien enemy, who is registered under the Aliens Restriction Act 1914, and has a permit under which he is residing in a prohibited area in the United Kingdom, may sue in our Courts during the war. His enemy status is for the time being removed, so far as his right of action is concerned. There is an English decision to the same effect: *Thurn & Taxis v. Moffet* (31 T. L. R. 24).

J. S. B.

## Reviews.

[SHORT NOTICES DO NOT PRECLUDE REVIEWS AT GREATER LENGTH IN SUBSEQUENT ISSUES.]

*Select Bills in Eyre. A.D. 1292—1333.* Edited for the Selden Society. By W. C. BOLLAND. London: Bernard Quaritch. 1914.

In *The Eyre of Kent*, Vol. II, Mr. Bolland drew attention to the remarkable procedure by Bills in Eyre, not hitherto observed, which was introduced for the prompt disposal of the suits of poor persons, thus throwing back to a much earlier period the origin of suits *in forma pauperis*. The present volume contains a selection of Bills in Eyre or Petitions *in forma pauperis* from the Eyes of Shropshire of 20 Edward I; of Staffordshire of 21 Edward I; of Lincolnshire of 14 Edward I; of Derbyshire of 4 Edward III; of Bills before the Justices in the Channel Islands of 2 Edward II and at Berwick-upon-Tweed of 7 Edward III. The Bills here published total 175. Those relating to the Channel Islands deal with various complaints of oppression and other wrongs committed by Sir Otes Grandison, the administrator appointed by Edward I and by the Justices in Eyre and Commissioners of "Quo Warranto," despatched by that monarch and his son; who, disregarding the exemption from English law hitherto enjoyed by the islanders, "wrested from them rights and hereditaments of which they and their ancestors had held peaceable enjoyment for generations." Eventually all these Petitions were ordered to be presented at Westminster—another breach of the islanders' privileges—either in person or by some one person representing them all, constituting an early example of a test case, and the probable employment of counsel. The Bills from Berwick-upon-Tweed were presented to determine the right to lands which had been seized by Robert Bruce and granted by him to his supporters, of which the King of England had taken possession after the Battle of Halidon Hill, in 1333. In this instance, the Commission appointed by Edward III appears to have done its work promptly and equitably. The great bulk of the Bills—157 in all—are from the counties named above, and cover a wide range of subjects of paramount interest to the legal historian. No misfeasance or non-feasance was too slight or too grave to be the subject of complaint in a Bill in Eyre. "The recovery of debts, large and small, and the enforcement of contracts were sought for

by them. Damages were claimed by them for detinue, breach of contract, trespass, negligence, illegal distress, wrongful imprisonment, for abduction of ward, for conspiracy to deceive the Court and to prevent the course of justice, and for almost every other tortious act or omission by which a man might be endamaged. As might be anticipated, these Bills contain much valuable evidence relating to provincial life, social and economic, and of provincial manners and customs prevalent in the 13th and 14th centuries. From one we learn that a branch of the Chancery, whence writs were obtainable, was temporarily established in the county in which an Eyre was sitting or about to sit. From another, the view expressed by the present writer in the pages of this *Review* that law schools were in existence in London in the 13th century with the power of conferring degrees in the Faculty of Law, is confirmed. The full text of the Bills, with a translation, together with the endorsements on the Bills and the existing subsidiary documents connected with them, as well as the relevant records in the Eyre and other rolls are also given in full. In his scholarly Introduction, which places Mr. Bolland in the front rank of legal historians, the learned Author deals with the derivations of the term Bill, rejecting the suggestions of *The Oxford English Dictionary* that it is derived from *bulla*, and deriving it from *bibilia*, "a little book," with a secondary meaning of "a petition"; with the authority of the Eyre; with the presentation, language and contents of the Bills; with the failure for their prosecution to an issue, and the reasons for such failure; with the meaning of the endorsements; and generally, with the various legal, historical, social, economic, philological and critical questions arising from a consideration of the Bills contained in this volume.

*Mens Rea, or Imputability under the Law of England.* By D. A. STROUD, LL.D. London: Sweet & Maxwell. 1914.

This is an exceedingly able treatise upon an exceedingly thorny and complicated subject, which has earned for the Author the degree of Doctor of Laws of the University of London. It has been written with the double purpose of presenting a comprehensive view of the main principles of imputability and of furnishing a practical guide to the Statute and Case law in which those principles have been adopted. After dealing with general principles in the opening chapter, such as intuition, Dr. Stroud discusses imputability in detail under the main heads of ignorance, infancy, insanity, drunkenness, active negligence, criminal omissions, constructive crime, compulsion,

coercion, and occasional licence. There is no more difficult question in the administration of the criminal law than that of determining the sanity or insanity of the accused. Under the title of insanity and also under that of compulsion, Dr. Stroud writes with the utmost lucidity and illumination. In the former he treats the expression usual in directions to the juries "an offence against the laws of God and nature" as quite out of date. There never was, he explains, a law of nature, and the Divine law has long ceased to have any close connection with the law of the land. The real test is, whether the accused is capable of judging the character of his act, under the law of the land. In the latter title Dr. Stroud discusses with conspicuous ability the controversial question of whether lack of self control or irresistible impulse, which he terms morbid criminality, should be accepted as an excuse for crime. He finds little difficulty in showing that this question must be answered in the negative. As has been well said, urgent evil desires do not make a man helpless; they only make him wicked. The law as it now stands refuses to recognise wickedness as a ground of immunity from punishment.

*Local Government, 1913-1914.* • Edited by A. MACMORRAN, K.C., M.A., and K. M. MACMORRAN, M.A., LL.B. London: Butterworth & Co. 1914.

Since the publication in 1908 of their *Encyclopaedia of Local Government*, the Publishers of this work have issued supplementary volumes, of which, the one before us, is the fifth. This volume contains the statutes, forms, orders, cases, and decisions of the Local Government Board relating to the subjects discussed in the Encyclopædia, and covers the period from September 1st 1913 to September 1st 1914. The arrangement follows the same line as its predecessors, but the even tenor of its course has been somewhat broken by the consequences of the war. Several statutes, due to this cause, although as we hope of merely a temporary character, have been rightly inserted in their appropriate place, and Government publications relating to exceptional measures arising out of the same cause will be found *in extenso*. Under the title of "Summary Proceedings," the Criminal Justice Administration Act 1914 is treated at length, although strictly it does not appertain to "local government." The annotations on the statutes, orders and memoranda converts this book from a mere compilation into a work of authority.

*The History and Present Position of the Bill of Lading as a Document of Title to Goods.* By W. P. BENNETT, LL.B. Cambridge: The University Press. 1914.

This is an historical and comparative study of the law relating to Bills of Lading, which has earned for the Author the York Prize for the year 1913. In dealing with the origin of these documents, the Author claims to have proved that they have developed from the mediæval ship's book or register. Originally, as he points out, the shipper's agent travelled with the goods, and the record of the goods shipped, entered by the ship's clerk in the ship's register, was a sufficient document of title to prove the merchant's right to the goods shipped in his name. When, however, the agent ceased to travel with the goods, a separate document was required, which detaching itself from the register, became known as a Bill of Lading. Further consequences followed. One document of title was insufficient. For his own protection it was necessary for the shipper to retain one copy, and for the consignee demanding delivery to be in possession of another. Thus arose the provision that Bills of Lading must be in triplicate. This theory, for which Mr. Bennett claims originality, appears to be well founded, but it must remain subject to the result of the study of such MSS. as have not yet been examined. The Author has confined himself to published works. Amongst the authorities upon which Mr. Bennett relies, he has failed to include the *Oak Book of Southampton*.

*Concerning Justice.* By L. A. EMERY. London: Oxford University Press. 1914.

The addresses contained in this volume were delivered by the Author, formerly Chief Justice of the Maine Supreme Court, in the Storrs lecture series 1914, before the Law School of Yale University. Judge Emery's analysis of the legal conception of justice is peculiarly appropriate at the present moment. It is based upon Mill's theory of individual liberty. "Human justice" he writes, "consists in securing to each individual as much liberty of action in the exercise of his physical and mental powers, and as much liberty to enjoy the fruits of such action, as is consistent with like liberty for other individuals, and with such restrictions only as are necessary for the welfare of society as a whole, without discrimination for or against any individual." Such justice, he maintains, can only be secured under a sound constitution and an independent judiciary. With

written constitutions, such as those in the United States, attempts are frequently being made in the Courts to assail the rights of individuals by inducing the judges to interpret the Constitution in favour of some particular group or interest. After the War of Independence the majority of judges were appointed during good behaviour, but the official tenure has since been reduced to a more or less brief term of years. In most States, also, judges are now elected by the people direct, and it is now proposed that the tenure should be during pleasure only of the majority of the electorate. Under such a tenure, no judiciary, argues Judge Emery, can be independent, and this state of affairs constitutes a real danger to democratic progress and to the liberty of the subject.

*The Doctrine of Judicial Review.* By E. S. CORWIN. London : Oxford University Press. 1914.

In this book Mr. Corwin, of the Department of History and Politics in Princeton University, deals with the legal and historical basis of the doctrine of judicial review in the United States. The origin of this power of judicial review has been the subject of such violent controversy that its calm discussion has become a matter of urgent importance to students of American Constitutional History. In the principal essay, Mr. Corwin has presented judicial review as the outcome of *legislative* power which arose in consequence of the astonishing abuse of their powers by the early State Legislatures, which was first appreciated for its full worth by the Convention that framed the Constitution of the United States. The framers of the Constitution saw clearly that the Constitution was to be regarded as the fundamental law, and that the judges were there to interpret its provisions as well as any further provisions enacted by the Legislature by virtue of the Constitution. And where these provisions conflicted, the Courts were to favour the Constitution as expressing the declared will of the Constitution. These simple propositions, however, were further complicated by the claims put forward by the State Legislatures which asserted sovereign powers. Under the Constitution, for instance, "police powers" were within the meaning of sovereign powers, and yet, nevertheless, such fact did not withdraw such from regulation by the National Government in the *bona fide* exercise of its powers. On the varied perplexities of these conflicting powers Mr. Corwin writes with illuminating precision, which will be appreciated by all students of Constitutional law and history both here and in America.

*Sea Insurance according to British Statute.* By WILLIAM GOW, M.A., LL.D. London: Macmillan & Co. 1914.

The Marine Insurance Act 1906 (6 Edw. VII, c. 41) was purely a consolidating measure, introduced by its framers with the object of reproducing, as nearly as possible, the law as it then was understood, without any attempt to extend or amend its generally accepted principles. The Act was therefore, with some minor exceptions, an attempt to consolidate the three previous Statutes, 19 Geo. II, c. 87, 28 Geo. III, c. 56; and 31 & 32 Vict., c. 96; and to give in a systematic form the results of all important decisions on those Statutes relating to marine insurance. The Author has found, however, that those engaged in the practice of marine insurance are slow to refer to the new Statute, and are still apt to go rather to the decisions of particular cases which bear upon the point at issue. "There is always the feeling," says Dr. Gow, "particularly in the non-legal mind, that it is better to prefer the definite statement of a general principle of an actual case to the necessarily more indefinite statement of a general principle such as is found in a code." To meet this feeling, Dr. Gow has here given a detailed statement of the provisions of the Statute, with a supplement, consisting of the essential parts of those leading judgments upon which the Marine Insurance Act has confessedly been constructed. This statement of the law is a masterpiece of precision and lucidity, and Dr. Gow's reputation for special knowledge in this branch of the law constitutes a guarantee of accuracy. In his Historical Sketch of the subject, Dr. Gow refers to a policy dated 1613, on the goods of a vessel called the *Tiger*, which recalls Shakespeare's lines in *Macbeth* and *Twelfth Night*, where the poet alludes to a vessel of this name.

*Aircraft in War.* By T. M. SPAIGHT, LL.D. London: Macmillan & Co. 1914.

This book was published before the War, and certain portions of the earlier part appeared in the *Army Review* for April of last year. With the rapid development of aircraft since 1908, in their range and capability as offensive engines of war, numerous questions have followed. The attempt to forbid their employment for offensive purposes was doomed from the first to failure. As Dr. Spaight says, directly their use was found to be of real military importance there was neither any probability nor indeed any strong reason for denouncing the employment of aircraft as an arm of war. With

the more practical questions around which controversy has arisen. Dr. Spaight deals, basing his conclusions where possible upon analogous rules of International law, and, where the latter are non-existent, upon common sense. It will be gratifying to him to find that so many of his conclusions have been accepted by the present belligerents as a rule of conduct. His claim, for instance, to national sovereignty of the air has been claimed by Switzerland and accepted by Great Britain. His conclusion that an undefended town does not mean a town without defensive fortifications, but a town unoccupied by armed forces is at once correct from International law, and from the actual conduct of all the belligerents except Germany. It is also in agreement with the *British Manual*. To justify bombardment "the defended locality need not be fortified, and it may be deemed defended if a military force is in occupation of or marching through it." Consequently, in Dr. Spaight's opinion, in which we agree, certain portions of London may legitimately be bombarded by aircraft. Dr. Spaight thought that a foe would shrink from exercising this right of distinction, but in view of the attacks upon similarly undefended places in England, Belgium and France by German aircraft, he would probably not adhere to this opinion. Dr. Spaight is throughout exceedingly illuminating and suggestive on a thorny and intricate subject.

**Second Edition.** *The Effect of War and Moratorium on Commercial Transactions.* By E. J. SCHUSTER, LL.D. London : Stevens & Sons. 1914.

*The Effect of War on Commercial Engagements.* By F. GORE-BROWNE, M.A., K.C. London : Jordan & Sons. 1914.

*Debtors and the War, their Rights and Privileges under the Moratorium.* By F. S. BRADLEY, M.A., LL.D. London : Stevens & Haynes. 1914.

No apology is needed for the publication of these books dealing with the relations created between contracting parties by the War. So long is it since Great Britain was involved in a Continental War, that little distinction had been made between foreigners residing in the United Kingdom and natural-born subjects. Moreover, so world-wide is the system of international credit which has developed in modern times, that in order to prevent national financial disaster, the Government introduced emergency legislation, by which financial transactions were for a time hung up, and which in some

cases are still hung up, in order to give debtors breathing space, and to prevent creditors taking an undue advantage in a time of stress. Upon the numerous intricate questions which under these circumstances arise for discussion, naturally no exhaustive text books dealing exclusively with the subject were in existence, although some are discussed in the numerous treatises on International law. In his treatise, Mr. Schuster deals mainly with the effect of the outbreak of War on agreements between subjects of belligerent States, and on the enforcement of those agreements by British Courts. Mr. Gore-Browne also confines himself to the same subjects. In each case the relevant emergency Statutes, Proclamations, and Statutory Rules and Orders, are given in the Appendices. Mr. Bradley, on the other hand, confines himself to the explanation of the provisions of the Postponement of Payments Act and the Courts (Emergency Powers) Act, and the Orders and Rules thereunder.

**Second Edition.** *Introduction to the Study of Law.* By FREDERICK M. GOADBY, M.A., B.C.L. London: Butterworth & Co. 1914.

Based upon the lectures delivered by the Author during the past four years at the Khedivial School of Law, Cairo, this book is intended for the use of students in the Law School, and is written with special reference to the needs of English-speaking Egyptians. Although in its main aspect this is a work on Jurisprudence, Mr. Goadby has refrained from using that title, because in the first place he does not confine himself to those topics which fall within the scope of Jurisprudence, strictly so called. Much is included which belongs to legal history, much which is of especial interest in Egypt, and much which it is useful for the Egyptian student to learn. It is written from a different standpoint altogether from that adopted in the English text books on Jurisprudence. Egyptian law is principally Romano-French law. The Mohammedan law, which once prevailed, is gradually being replaced by European law, and in this change the influence which prevails is French rather than English. Mr. Goadby has, therefore, drawn upon French and Mohammedan sources for his illustrations. In the present edition, considerable additions to the text and footnotes have been made, and further references to authorities given. Indispensable to the Egyptian law student, this book is of especial interest in the study of Comparative Jurisprudence.

**Fifth Edition.** *Wigram's Extrinsic Evidence in Aid of the Interpretation of Wills.* By C. P. SANGER. London: Sweet & Maxwell. 1914.

It is certainly a little startling to find a new edition of a text-book, the last edition of which was published so long ago as 1858. This was the Fourth Edition, edited by Mr. W. Knox Wigram, who inserted a certain amount of fresh matter in the text as well as in the notes. The present edition, however, is reprinted verbatim from the Third Edition, edited by the original Author, Sir James Wigram, Vice-Chancellor.\* The modern cases, with Mr. Sanger's comments, are added to the foot-notes, and enclosed in square brackets to distinguish them from Sir James's notes. It is curious to note that the Third Edition was little more than a reprint of the Second, which was published in 1834. It is certainly remarkable that the seven propositions applicable to the exposition of Wills, propounded by Sir James Wigram in 1824 (the date of the First Edition), should have stood the test of time, by passing through unscathed the searching ordeals of the Courts for nearly a century. Such a book is invaluable for its contents to the Chancery lawyer, but as a mere curiosity of literature it was well worth reprinting.

**Fifth Edition.** *Principles of Equity.* By H. ARTHUR SMITH, M.A., LL.B. London: Stevens & Sons. 1914.

Since the appearance of the last edition of this work in 1908, the Statutes affecting the subject-matter have been few. The most conspicuous are the Conveyancing Act 1911, the Copyright Act 1911, and the Bankruptcy Act 1913. The second of these, embodying as it does many principles, which previously rested upon the decisions of the Courts, has necessitated the re-writing of the sections dealing with this subject. The more important cases bearing upon the general subjects discussed appear to have been duly noted, although we still find some decisions omitted, as in the last edition, which we should have expected to find. At the same time, in a book intended for students, the notes may easily be over-burdened and only lead to confusion. Upon such a question the critics may well differ, and Mr. Smith is perhaps justified in taking his own course. If he had not at the same time written his book also for practitioners, his justifications would have been complete. This is a rock upon which many writers of text books founder. The needs of students and practitioners are widely different. In the present case, the

Author's original purpose "in distinguishing between the principles of law and equity for the time being in force, and doctrines which have been rendered obsolete by the course of recent decisions or the current of legislation," has been well maintained, and the work as a whole carefully brought up to date.

**Sixth Edition.** *Bell's Sale of Food and Drugs Acts 1875 to 1907.*  
By CHARLES F. LLOYD. London: Butterworth & Co. 1914.

Since the publication of the Fifth Edition this work, for which Sir William J. Bell was originally responsible, the Milk and Dairies Act 1914, and the Public Health (Milk and Cream) Regulations 1912, have been placed on the Statute Book. The former has considerably altered the law as to samples of milk and cream, and with the latter has strengthened the hands of various public authorities in preventing the sale of adulterated or unwholesome milk. Both the above have been incorporated in the text, together with various Circular Letters from different Government Departments, and a few forms of Information and Summons. On the other hand, some other Acts relating to adulteration, such as the Bread Acts and Adulteration of Seeds Acts, have been omitted, since they are considered as of little use for the practitioner for whom this book is intended. The Chemical Notes have once more been revised and enlarged by Mr. R. A. Robinson, and the work generally been brought up to date.

**Ninth Edition.** *A Guide to Criminal Law and Procedure.* By CHARLES THWAITES. London: George Barber. 1914.

*The Criminal Justice Administration Act 1914.* By NEVILLE ANDERSON. London: Stevens & Haynes. 1914.

The first of these books has been slightly enlarged by the inclusion of such provisions relating to crime as have found their way to the Statute Book since the appearance of the last edition in 1910. This Guide has been so frequently noticed here, that we need say no more than that the law student will find it invaluable in a final revision of his work before his examination.

Mr. Anderson's object has been not to present an exhaustive treatise upon the Criminal Justice Administration Act 1914, but to emphasise the main changes in the law which have been effected by the Act. Subject to this limitation, the Act is fully and carefully

annotated. The Affiliation Orders Act 1914 is to be found in the Appendix.

**Tenth Edition.** *Key & Elphinstone's Compendium of Precedents in Conveyancing.* By Sir H. W. ELPHINSTONE, Bart., and F. T. DAW, LL.B., assisted by H. S. MYER, LL.B., and H. G. A. BAKER, M.A. 2 Vols. London: Sweet & Maxwell. 1914.

Once more five years have elapsed since the publication of the previous edition of this standard work. Apart from those changes and additions rendered necessary by legislative enactments and Rules of Court, important alterations have been effected in the form and arrangement of the precedents. Many of these have been arranged in paragraphs. For instance, in the forms on Conditions of Sale, the various forms relating to the provisions for execution by an attorney, in consequence of one of the vendors being abroad, are set out consecutively. "As a general rule," the learned Authors state, "recitals and operative clauses, which are capable of being used in precedents of different natures, have been removed from the precedents and collected under appropriate heads, so as to enable the practitioner to compare provisions *in pari materia* and to select those most adapted to his purpose." A most important change in the forms of Conditions of Sales is the substitution of the old more or less vague notice of known incumbrances by a general form supplementing the disclosure of incumbrances contained in the particulars, and giving notice of incumbrances accidentally omitted therefrom. As an instance of the care and thoroughness with which the forms and explanatory notes have been revised, we may refer to the precedent for Gifts of Residue at p. 867, which has been amended in the note, in consequence of the effect of the decision in *In re Lane* (L. R. [1908], 2 Ch. 581). Forms relating to dealings with land affected by the Land Transfer Act, have been adapted to the present practice of the office of Land Registry. In other directions new precedents have been added, and all those of partnership articles have been remodelled. Throughout, many new forms have been added to those upon which the various precedents are based. Another most important alteration is the substitution of a single Index for each volume in place of the two indexes, referring respectively to the notes and to the forms formerly appearing in each volume. This has resulted in a far more convenient, full, and adequate means of reference.

**Twelfth Edition.** *A Summary of the Law of Companies.* By T. EUSTACE SMITH and C. H. HICKS. London: Stevens & Haynes. 1914.

**Fourth Edition.** *Principles of Company Law.* By ALFRED F. TOPHAM, LL.M. London: Butterworth & Co. 1914.

*Private Companies.* By HERBERT W. JORDAN. London: Jordan & Sons. 1914.

The first of these manuals was originally published in order to give the student, who was unable to find time in which to master the standard text books, a general view of the principles and practice of the law affecting Companies. Since the publication of the last edition in 1909 few changes in the general law have taken place, although such changes are important. The alterations due to the Insurance Companies Act 1909 and the Companies Act 1913 are clearly set forth.

Mr. Topham's book is intended not only for law students but also for the use of accountants. For the benefit of the latter class the text has been considerably increased by the addition of special notes on the duties and position of receivers and liquidators, and of the winding-up rules. There is little to choose between these two books, but the student in a hurry will probably prefer Mr. Topham's, in which the test questions in the Appendix should particularly appeal.

The object of Mr. Jordan's brochure is to urge the advantages of a private company. These advantages to commercial men are clearly set forth. Many business men, Mr. Jordan contends, had they converted their concerns into private companies before the war, would have found themselves in a much stronger position, and those who in consequence of the war have gone under might have saved themselves. Even now, with the goodwill and co-operation of creditors, it is possible by this means to save the situation. The steps by which a business may be converted into a private company, and the restrictions implied thereon, are succinctly stated.

**Fifteenth Edition.** *The Workmen's Compensation Act 1906.* By W. ADDINGTON WILLIS, LL.B. London: Butterworth & Co. 1915.

**Fifth Edition.** *The Workmen's Compensation Act 1906.* By ALBERT PARSONS, K.C. London: Butterworth & Co. 1914.

Both these books have been so frequently noticed in these pages that little more remains to be said. The former has become an

exceedingly hardy annual. It contains no less than 150 new decisions given by the appellate tribunals since the appearance of the previous edition in 1913. Those from Scotland and Ireland are noted up to October 7th, 1914, and those from England to October 24th.

On the other hand, it is four years since the appearance of the Fourth Edition of Mr. Parsons' work, during which period some five to six hundred cases have been decided by the Appellate Courts. In both books the same ground is covered, and the same method of annotation employed. In each case the Appendices contain the same matter, such as the Rules and Forms, sections from other Statutes which are applicable, and the text of the Workmen's Compensation Act 1906. The only difference lies in the treatment of the decided cases. Whilst Mr. Willis aims at giving the effect of every important case, with the outstanding relevant facts, Mr. Parsons has adopted a different procedure. His object has been "to discuss and to define the law that is embodied in the decisions rather than to provide an exhaustive digest of the cases." He has taken this course because a large number of these decisions turn on the proper application to special sets of facts of principles previously laid down, without in any appreciable degree modifying or defining more sharply the principles themselves. They have therefore been cited in some instances as illustrations of the proposition under discussion, and in others they have been cited by name only. This method finds its justification from the tendency more recently exhibited in the Court of Appeal to take a wider view upon the arbitrator's findings "of fact," which they have not hesitated to reverse where such findings constituted a breach of some underlying principle of law.

*The Law of Income Tax relating to Business Profits.* By ROLAND BURROWS, M.A., LL.D. London: Sweet & Maxwell. 1914.—The scope of this book is strictly limited to the subject announced on the title page, and is in no sense an attempt to deal with the Income Tax Acts as a whole. Its object is to provide a concise statement of the principles upon which business profits are taxed, and a sketch of such other matters as require to be understood, in order to apply those principles. Dowell still remains the indispensable guide to all the intricacies of the manifold forms of income tax. In the difficulties which arise from the operation of the Income Tax Acts, due so largely to the complexity of modern commercial life, the business man will find this lucid exposition of the law invaluable.

**Ninth Edition.** *A Compendium of the Law of Torts.* By HUGH FRASER, M.A., LL.D. London : Sweet & Maxwell. 1914. In the preparation of the present edition of this admirable students' guide to the Law of Torts, Mr. Fraser has again had the assistance of Mr. Roland Burrows. This book is the outcome of a series of lectures delivered by Mr. Fraser at Liverpool nearly thirty years ago. It was compiled with a view to assist those of his own pupils who desired to study this branch of the law. The present writer was one of Mr. Fraser's first pupils, and after more than a quarter of a century, he still retains a vivid recollection of the invaluable aid those notes became, not only for examination purposes, but also in his practice at the Bar. As an introduction to this branch of the law this compendium has from the first held a leading position from which it will not easily be displaced.

Books received, reviews of which have been held over owing to want of space :—Holland's *Law relating to the Child*; Hodson's *Practical Accounts for Executors*; Alverstone's *Recollections of Bar and Bench*; Bouvier's *Law Dictionary*; Bosanquet's *British Employment in Force in Native States*; Rose's *The Origins of the War*; Barclay's *Law and Usage of War*; Stockton's *Outlines of International Law*; Tugarten's *Heeres Rechte*; Trotter's *Law of Contract during W.M.*; Butterworth's *Unbroken Compensation Cases*, Vol. III; Annual *County Courts Practice*; Magistrate's General Practice; Geden's *Trusts and Trustees*; Dicey's *Law of the Constitution*; Paterson's *Licensing Acts*; Yearly *County Court Practice*; Crew's *Procedure at Meetings*; Railway and Canal Traffic Cases, Vol. XV; del Vecchio's *The Formal Basis of Law*; Melville's *Principles of Roman Law*.

Other Publications received :—Lowry's *Martial Law within the Realm* (John Long); *The Companies Diary and Agenda Book* (Jordan & Sons); Sarsatti's *Per Una Maggio Tutela, and Il Processo Civile Inglesi*; Fiji's *London Charities* (Chatto & Windus); Brown's *Judicial Recall* (Government Printing Office, Washington); Lawyer's *Remembrancer* (Butterworth & Co.); Marburg's *Law and Judicial Settlement*, Richards' *Does International Law still exist?* (Oxford University Press); Kranenburg's *Bedecknis der Rechtswissenschaft*.

The *Law Magazine and Review* receives or exchanges with the following amongst other publications :—*Juridical Review*, *Law Times*, *Law Journals*, *Justice of the Peace*, *Law Quarterly Review*, *Irish Law Times*, *Australian Law Times*, *Canada Law Journal*, *Canada Law Times*, *Chicago Legal News*, *American Law Review*, *Harvard Law Review*, *Case and Comment*, *Green Bag*, *Madras Law Journal*, *Calcutta Weekly Notes*, *Law Notes*, *Law Students' Journal*, *Bombay Law Reporter*, *Medico-Legal Journal*, *Indian Review*, *Kithidwar Law Reports*, *The Lawyer* (India), *South African Law Journal*.

THE  
LAW MAGAZINE AND REVIEW.

No. CCCLXXVI.—MAY, 1915.

I.—AIRCRAFT ATTACKS.

IT is proposed in this article, first, to ascertain as far as possible the law with respect to aircraft attacks, and, secondly, to consider its application to recent incidents in the War. A preliminary investigation of the law is essential, as there has been a tendency in some quarters to take the general knowledge of it for granted, and in others to base condemnation of cruelty in these attacks on moral grounds only. This is adverse to the interests of International law. Looking at the mere brutal consequences of the bombing on Yarmouth and King's Lynn, any human being, lawyer or layman, must justly feel the strongest moral indignation. It is a pitiful spectacle that the sole material results of the attack were some ruined houses and the deaths of a middle-aged shoemaker, two women and a boy. But the lawyer must carry matters a little further than this.

If International law condemns such acts, so much the better; if it justifies them, then it has failed sadly, but not hopelessly, for it rests with neutrals during the war to foster a body of opinion in favour of better rules, and with all States at the end of the war to fix and to accede formally to these rules. In the meantime, it may be conceded that the

conventional law (*i.e.*, that based on international agreement) is uncertain, and also that practice is fluid. But it must also be insisted that the general principles of International law remain unchanged, and give a key to the answer of some of the questions that have arisen.

The whole crux of the legal position of aircraft in war is their novelty. Till the present war there had not been much opportunity of using them for attacks, though they had already been employed in the wars in Tripoli, Mexico, and the Balkans, and in the last case in such a way as to produce a decided moral effect. It is generally safe to say that new weapons will always be unpopular with the belligerent against whom they are used, and suspected by neutral Powers and that the laws of war with respect to them will be uncertain or non-existent.

Of the prejudice against warlike inventions we get plenty of proof in the history of warfare. When Bayard was mortally wounded by an arquebus shot, in 1524, he thanked God that he had never shown mercy to a musketeer, and Montluc, the French marshal of the sixteenth century, spoke of the arquebus as "the devil's invention." Yet gunpowder had been used in the battle of Crécy nearly two centuries before this.

When the cross bow was new, it was so detested that it was anathematised by the Lateran Council in 1139 as *artem illam mortificram et Deo odibilem*, and, in consequence, some rulers ceased to issue it to their troops. Red-hot shot was at first thought an improper method of warfare. So was the bayonet, which was well known long before it was in common use, no doubt, as Sir Henry Maine suggests, because it was feared that infantry caught using it would get no quarter.

The same writer remarks that "when it was first invented, the torpedo was received with downright execration." We had already taken some steps to defend

our shores by something of the sort against Napoleonic attacks, when the peace of 1814 shelved the invention till the American Civil War, 1861-65, when it re-appeared as the "American Turtle."

Thus the belligerent who uses a new weapon must expect to be unpopular in any event, and the more effective the weapon is in destruction, the worse will be the feeling against it. But he can console himself with the other effect of its introduction—the absence of any clear law on the subject.

This gives him a dialectical advantage, for, putting aside as prejudiced the complaints of the other belligerent, neutral States find it extremely difficult to lodge a protest with much effect when they have to cast it in the form of an argument of what the law ought to be instead of a statement of what it is. The user of the new implement or method can always retort with other arguments, which are at least plausible

From the nature of the Laws of War, it follows that there will always be no clear rules on any new weapon till it has passed through the fire of war. Till then its value is unknown, and, unhappily, there is no other mode of testing it. But it must be repeated that national acts by no means alter the first principles of International law, and though these may not help to detail positive rules for the use of a new weapon, they can certainly pronounce negatively against outrageous abuse of it. When the torpedo was invented, there may have been difference of opinion as to whether it were a lawful weapon at all. But there could have been no difference of opinion as to whether it would have been lawful to sink by a torpedo an enemy fishing-smack without any notice to its crew. That would be a disgraceful outrage of the laws of war, whether the sinking had been by a weapon known for a thousand years or invented in that very war.

Aircraft as a mode of attack are practically new weapons in this war. Their position must be examined firstly from the point of view of the Hague Conferences, and secondly from the general principles of International law, apart from the special rules of those Conferences.

There had been little serious attempt before 1899 to grapple with the problem of aerial warfare. The only case of any importance in which it had demanded consideration was the use of balloons by the French in the Franco-Prussian War of 1870. They were not employed for purposes of attack at all, but the Germans seem to have had a confused idea that persons in them who crossed the German lines were liable, if caught, to the summary treatment of spies. No such prisoner was in fact ever executed, but aeronauts were treated very harshly. M. Verrecke, who descended with others in Bavaria, was sent to a military prison, and was not freed till two months after the treaty of peace had been signed; and M. Nobécourt, who was captured in similar circumstances, was sentenced to death, though the sentence was commuted to imprisonment in a military fortress. The German view was wrong in principle, for none of these persons acted with the secrecy or disguise essential to the character of a spy. Nor does the technical definition of a spy, which has since been adopted in Art. 29 of the Hague Convention 1899, lend any more colour to the contention. He is a person who, "acting clandestinely, or on false pretences," obtains or seeks to obtain information in the zone of operations of a belligerent.<sup>1</sup>

The question of aircraft as a means of attack thus came before the Conference of 1899 as one *prima impressionis*. The contracting Powers agreed to prohibit, for a period of

<sup>1</sup> Cf. Oppenheim, *International Law*, II, sect. 160; M. Fauchille's proposed Code (Art. 7), *Annuaire de l'Institut de Droit International*, 1911; M. le Moyne's proposed Code (Art. 6), in *Le droit futur de la guerre aérienne* (Nancy, 1913); and Mr. J. M. Spaight's proposed Code (Art. 8), in *Aircraft in War* (1914), p. 116.

five years, the discharge of projectiles and explosives from balloons or by other new methods of a similar nature. This term expired September 4th, 1905.

The aeroplane was, in 1899, too imperfect to be of practical use in any capacity, and it is curious to read now that, in 1896, considerable progress with it was thought to have been made because the American Langley machine "actually flew once for half a mile, and again for three-quarters of a mile."

But when the second Hague Conference met in 1907, the science of aerostatics had advanced so much that the question was a burning one, and the Belgian delegate's earnest plea that on this very ground the Powers should renew the 1899 Declaration, and thus refute the charge that they had only prohibited aircraft attacks then because it was so unlikely that they could be made successfully, fell upon deaf ears.

It is true that the contracting Powers agreed to prohibit until the close of the third Peace Conference the discharge of projectiles and explosives from balloons or by other new methods of a similar nature, but only 27 out of 44 States signed this Declaration, and of these 27 only 8 subsequently ratified it. Among the States who did not sign were Germany, France, Italy, Japan, Montenegro, Roumania, Russia and Servia.

The Declaration was also necessarily limited in its practical application by the provisions that it should only bind the Powers who did sign, in case of war between two or more of them, and that it should cease to be binding from the time when, in a war between signatory States, one of the belligerents should be joined by a non-signatory Power.

We thus reach the unsatisfactory conclusion that none of the Powers engaged in the present war is bound by the Declaration. Nor can it be said that International law, apart from the Hague Convention, prohibits the use of

aircraft (abstractedly from the question of the mode or object of attack) in warfare. It may be regrettable that a third element besides earth and water can be used as a battle ground, but there is no general principle which forbids this.<sup>1</sup>

But the Declaration leaves unsolved two problems. On the face of it, it throws no light on the kind of projectile which may be discharged from aircraft by the military authorities of non-signatory Powers, nor on what may be the object of their attack. These points must be separately considered.

As to the first, we start with the general principle that bombardment by military balloons is subject to the same restrictions accepted for land and sea warfare, in so far as this is compatible with the new method of fighting. This, it is true, formed no part of the 1907 Declaration regarding aircraft, but it was conceded by 31 votes to 1 (with three abstentions) in the discussion which preceded the final draft of the Declaration. We have then, first, to ascertain what the restrictions are, and secondly, to see how they must be modified to suit aircraft.

It is stated generally in Art. 22 of both the 1899 and 1907 Conventions that the right of belligerents to adopt means of injuring the enemy is not unlimited, and in Art. 23 (e) that the employment of arms, projectiles, or material of a nature to cause superfluous injury is especially forbidden. Further, Declaration II of 1899 is an agreement by the contracting Powers to abstain from the use of projectiles the sole object of which is the diffusion of asphyxiating or deleterious gases, and this was signed by (*inter alios*) all the belligerents in the present war. Declaration III

<sup>1</sup> The question as to the legality of passage by hostile aircraft over neutral territory is still too controversial to be dealt with here. See J. M. Spaight, *Aircraft in War*, ch. V, and Appendices and Authorities there cited; and Wilmet E. Ellis, *Aerial land and aerial maritime Warfare* (*Am. Journ. of Int. Law*, April, 1914, pp. 265-7, 273).

of 1899 is also an agreement to abstain from the use of bullets which expand or flatten easily in the human body, and here again the belligerents in this war were signatory parties.

The Declaration of St. Petersburg, 1868, was an engagement by the contracting Powers to renounce, in the case of war among themselves, the employment by their naval or military troops of any projectile weighing less than 400 grammes (about 14 ozs.) which is either explosive or charged with fulminating or inflammable substances. The reason for this was that projectiles of a less weight uselessly aggravated the sufferings of disabled men or rendered their death inevitable. It is based upon the same humanitarian idea which forbids the use of expanding bullets. It was impliedly adopted by Art. 23 (e) of both the Hague Conventions relating to the Laws and Customs of War on Land.

Now there is nothing in the nature of aerial warfare which should modify the law thus stated, and it may be assumed that the restrictions apply to it.<sup>1</sup> The Institute of International Law, at its 1911 meeting, resolved that aerial warfare must not comprise greater danger to the person and property of the peaceful population than land or sea warfare. There is evidence that the German bombs dropped from Zeppelin airships might be likely to cause a dangerously septic wound owing to the development of poisonous phosphorus on detonation, but any protest against their use on this score is not likely to be successful. Shrapnel wounds are also likely to prove septic, and nobody seriously contends that the use of shrapnel contravenes the Laws of War.

The law as to the kind of projectile which can be used is, therefore, fairly easy to state. But the problem of what may be the object of aerial attacks is a much wider one, and the answer to it is difficult to ascertain.

<sup>1</sup> See Oppenheim, II, sect. 114.

Art. 25 of the Hague Convention 1899 relating to the Laws and Customs of War on Land forbids the attack or bombardment of towns, villages, habitations or buildings which are not defended. Art. 25 of the similar 1907 Convention repeats this, but adds after "bombardment" the words "by any means whatever." It appears from the discussions in the sub-committee on this Article that the members considered that the discharge of projectiles from balloons, whether by a military or naval force, was to be governed by this rule.

Art. 26 and 27 of both Conventions deal with bombardment in general terms. Art. 26, which is identical in each Convention, provides that the commander of an attacking force, before commencing a bombardment, except in the case of an assault, should do all he can to warn the authorities of it.

Art. 27, which is also the same in both Conventions, except for the words italicised, provides that in all sieges and bombardments all necessary steps should be taken to spare, as far as possible, buildings devoted to religion, art, science and charity, *historic monuments* [added in 1907], hospitals and places where the sick and wounded are collected; provided they are not used at the same time for military purposes. The besieged should indicate these buildings or places by some special visible signs, which shall previously be notified to the assailants.

The Geneva Conventions of 1864 and 1906 need not be detailed here. It is enough to note that in general they exempt from attack persons and property exclusively devoted to the care of sick and wounded. For injuries done to them, which are inevitable in methods of lawful warfare, the attacking State is, of course, not liable.

How far, if at all, must the rules stated above be qualified to meet the case of aircraft? Art. 25 clearly applies without modification. Art. 26 can certainly have

no application, for it would render any aerial attack almost entirely futile. If any previous notice of it, however short, were given, Art. 27 can be of little practical use, though it is no doubt applicable in theory. It is implicated with the question of accuracy in the aim of aircraft projectiles, and this will be considered later.

Convention IX of the 1907 Conference dealt with naval bombardment of unfortified places, and with considerable care prescribed its limits, but it cannot be taken to apply to aerial attack. There is a general prohibition of such naval bombardment in Art. 7 of this Convention, but there is a very significant omission of the words "by any means whatever," and this, combined with Art. 25 of Conventions of 1899 and 1907 (*ante*), leads to the conclusion that it does not cover aerial attacks.

The conventional law thus stands in an unfortunate position of uncertainty. It cannot be reconsidered till the present war ends, and the next Hague Conference is held, and we are driven back upon first principles. The Madrid resolution of the Institute of International Law in 1911, that aerial warfare must not comprise greater danger to the person and property of the peaceful population than land or sea warfare, forms a valuable starting point for argument.

It is only a branch of a much older and wider principle that unnecessary suffering in war should not be inflicted. And certainly suffering is unnecessary if it is out of all proportion to the enemy's military gain. In aerial warfare the closest obtainable analogy is naval bombardment, and it might well be made the gauge of lawfulness in balloon and aeroplane warfare. Art. 6 of M. Fauchille's projected Code 1911 provides that "the bombardment by aircraft of towns, villages, habitations or buildings which are not defended is forbidden," and that "the rules established by the Hague Convention of 18th October, 1907, relative to

Sieges and Bombardments by Land or Naval Forces are applicable to aerial war." Convention IX of the 1907 Conference on naval bombardment was signed (with certain reservations hereafter discussed) by all the Powers represented except China, Spain, and Nicaragua. Despite the fact that all the signatory Powers have not ratified it, it probably represents International law on naval bombardment, and arguing from its rules, be they harsh or mild, we cannot suggest more, or submit to less, humane rules in instituting an analogy with respect to aerial warfare, with any prospect of universal acceptance.

The first Article of Convention IX forbids the bombardment by naval forces of undefended ports, towns, villages, dwellings, or buildings. This at once raises the question, "What does undefended mean?" The question, it will be noticed, is equally relevant to Art. 25 of the 1907 Convention, which forbids the bombardment by any means whatever of undefended places. The Committee on Convention IX discussed the meaning of the word, but owing to the difficulty of distinguishing between the defence of a coast and of a town near the coast, no definition was attempted.

This official renunciation of any attempt to answer the conundrum does not encourage the efforts of others to solve it. But some help is to be gleaned from the Convention itself.

The latter part of Art. 7 states that a place cannot be bombarded solely because submarine mines are anchored off the harbour. Great Britain, France, Germany, and Japan reserved their consent to this, and the argument that mines are more deadly than guns certainly lent point to their view. But the ground of their objection does not exist in attacks by aircraft on such a port, and the argument that the port is to be regarded as defended if fenced by mines is untenable in that case. No coast town ought therefore to be attacked by aircraft merely because its

harbour is defended by mines, unless the attack be by hydroplanes.

Art. 2 allows military works, military or naval establishments, depôts of arms or war material, workshops or plant which could be utilised for the needs of the hostile fleet or army, and ships of war in the harbour to be destroyed by the naval commander's artillery, after a summons followed by a reasonable interval of time, if all other means are impossible, and when the local authorities have not themselves destroyed them within the time fixed. Nor does he run any responsibility for unavoidable damage caused by bombardment in such circumstances. If, for military reasons, immediate action is necessary, and no delay can be allowed to the enemy, it is understood that the undefended town must not be bombarded, and that the commander must take all due measures in order that the town may suffer as little damage as possible. Independently of the aid to be derived from Convention IX itself in determining the meaning of "undefended," there is little to assist one. The Institute of International Law in 1896 adopted the view that a great centre of population (e.g., London) is an undefended place, though it contains barracks, stores, and bodies of troops. But a different view is taken in the German Kriegsbrauch, and in the British Official Manual for the guidance of troops in war. And it is clear from the wording of Convention IX of 1907 that the 1896 resolution of the Institute cannot now be interpreted as excluding from bombardment the *whole* of a place like London. Those parts of it which contain the military or naval establishments specified in Art. 2 are liable to bombardment.

Now, if the things described in this Article may be destroyed by naval bombardment, there is no reason why they should not be destroyed by aerial bombardment, subject to the same limitations in so far as it is possible to apply.

them, and provided that the aerial bombardment has the same amount of precision as moderately good naval gunnery.

Art. 2 requires from the naval commander "a summons followed by a reasonable interval of time" before the objects stated may be destroyed, but also makes this unnecessary if immediate action is necessary for military reasons, and even then the other parts of the undefended town must not be bombarded. Such previous notice is practically impossible in the case of aerial attack, which, it may be assumed, can therefore be made at once.

But it is doubtful whether the comparative accuracy of aim that is possible in naval attack is also possible in aerial attack. The whole of Art. 2 proceeds upon the assumption of this accuracy in a naval bombardment. Indeed, the Article is worthless from the point of view of the place attacked on any less assumption. It is very likely that a naval gunner would not get the range of the object with his first shot, and some latitude of damage to the undefended parts of the town must necessarily be allowed him before he does get it; for some of the objects mentioned in Art. 2 will afford a small, or at least not easily discernible, target at a great distance. Examples would be a railway station, a bridge, or a coal-stack, all which it is suggested may very well fall within the vague words "war material" and "plant" used in the Article.

When we turn to aircraft attack, some deductions as to the accuracy with which bombs can be dropped from them are possible since the war began. These deductions require cautious statement, for the evidence, while it is good as far as it goes, does not always go far enough.

On September 22nd, 1914, a British airman successfully dropped bombs from an aeroplane on the Zeppelin shed at Düsseldorf. Early in October three British officers made another aeroplane raid on Düsseldorf; one of them hit a

Zeppelin shed and destroyed a Zeppelin. At the end of November the Zeppelin airship factory at Friedrichshafen was the object of an aeroplane raid by three British officers, who reported that they had done serious damage to the airship sheds. Towards the end of December bombs were also dropped from a British aeroplane on a German airship shed at Brussels. On January 22nd, 1915, British aeroplanes dropped bombs on two submarines at Zeebrugge. On February 12th the Admiralty announced that 34 British naval aeroplanes and seaplanes had attacked German submarine bases and establishments and had reported that great damage was done to the railway stations at Ostend and Blankenberge.

We do not know what incidental damage (if any) was done to surrounding non-military objects before the targets were hit in these various attacks, but as no real protest is to hand from Germany on that score, it may fairly be inferred that the aeroplane skilfully managed can get an accurate range without unreasonable loss of non-combatant life or injury to surrounding property.

Now, an aeroplane cannot keep aloft at a less speed than 40 miles per hour. An airship, on the other hand, can hover. Its aim should therefore be more accurate; but the great height at which it must remain, and the necessity of motion to counteract the effect of anti-aircraft guns, no doubt discount this advantage. Be that as it may, if an airship can attain no greater accuracy of aim than was shown in the recent attacks on King's Lynn and Yarmouth, it should be condemned as an improper weapon in warfare.

But this recent attack must be considered from quite another point of view. It is beside the mark to apply tests as to accuracy of aim to the attacks by these Zeppelins, for it is submitted that they never aimed at any proper object at all, but in mere recklessness flung bombs overboard,

regardless of what they hit, as long as it was an inhabited place. Now, mere reckless bombardment, whether from land, air, or sea, with the sole object of terrifying the population of a town, is inexcusable. To kill civilians in order to scare more civilians is a grotesque inversion of the purposes of war. "If," said M. Rolin (who voiced the views of the majority at the 1911 meeting of the Institute of International Law), "the employment of aircraft as a means of war is to be proscribed, it must first be shown that they are, as engines of war, unnecessarily cruel." And the same applies to the mode of attack adopted by them when their legality is admitted. A more improper mode of attack could scarcely be conceived than that indicated.

Count Reventlow, in the *Deutsche Tageszeitung*, put forward the astonishing excuse that, as the Zeppelins were flying to the fortified place of Yarmouth, they were shot at by "English Francs-tireurs" from other places over which they passed, and that this justified the bomb-dropping. There were no "francs-tireurs," and even if regular soldiers had fired at the Zeppelins, the action of these craft in dropping bombs indiscriminately in consequence, would have been as rational or lawful as German butchery of the inhabitants of a Belgian village because Belgian regular troops had defended another Belgian town twenty miles distant.

We can therefore give a decided opinion on the recent Zeppelin raid on the ground stated. Apart from this, the law relating to aircraft attacks properly carried out is uncertain, and the capabilities of aircraft must be made clearer by experience before detailed regulations as to their use can be accepted. The whole question must be reconsidered at the end of the war, and till then the only representative guide we have is the opinion of neutral States and the general principles of International law.

If accuracy of attack by aircraft is or becomes possible, then there is every reason to suppose that the rules with respect to them will *mutatis mutandis* be those as to naval bombardment. If, on the other hand, disproportionate suffering must be inflicted before the proper target can be hit, it would certainly seem advisable "to frame an International Convention declaring great mixed agglomerations of population immune from aerial attack, even though garrisoned and containing establishments, installations, etc., which it would be legitimate to bombard in naval war."<sup>1</sup>

PERCY H. WINFIELD.

<sup>1</sup> Spaight, *Aircraft in War*, 22-23. The word "great" does not seem essential. If London or Berlin ought to be exempted, so ought places like King's Lynn or Schirmeck, if they contain garrisons or military establishments.

## II.—DEFAMATION IN THE LOCAL AND ECCLESIASTICAL COURTS.

IT has always been a somewhat vexed question why it was that, down to the close of the 14th century, the King's Courts refused to entertain pleas of defamation. It has been suggested that in those early days the King's justices were more intent on questions of tenure than on questions of tort, and allowed the ecclesiastical authorities, who were never behindhand in claiming cognizance of any cause which could by any possibility be brought under the heading of ecclesiastical economy, to establish a jurisdiction over all cases of defamation. According to Coke, an earlier Act than the *Circumspecte Agatis* of 13 Edw. I had granted the cognizance of defamation to the Courts Christian. He says:—"By this (13 Edw. I) it appears that the cognizance of defamation was granted by Act of Parliament, for

otherwise it could not be granted."<sup>1</sup> It is true the words of sect. 8 run: "In cause of defamation, it hath been granted already, that it shall be tried in a Spiritual Court," but no record of any earlier Act has come to light. Possibly, as Coke suggested, the *Circumspecte Agatis* was not the first word on defamation, for the wording of sect. 8 seems to suggest a limitation of the jurisdiction of the Courts Christian in this matter. According to the Statute, it is only when money is not demanded, and the action is brought for punishment of sin, that the Ecclesiastical Courts are to hear causes of defamation, which seems to suggest that even at this early stage the *Curia Regis* had started to limit the jurisdiction of the Ecclesiastical Courts in this matter. Equally interesting would it be to fix the date when the King's Courts first treated defamation as a tort. According to Pollock and Maitland, the Royal Justices were beginning to reconsider their doctrine of refusing pleas for defamation, and "to foster an action on the case for words," somewhere about the year 1483, though probably it was getting on towards the end of the 16th century before any such actions became common.

It would, however, be incorrect to state that up to this period the Courts Christian had sole jurisdiction over defamation. It is true the King's Courts would have nothing to do with such actions, but they were by no means unknown in the Customary and Leet Courts throughout the 11th, 12th, and 13th centuries. Not only do we find general injunctions against scolding in the vill like the *Injunctum est omnibus mulieribus quod compereant linguis suas et quod non litigent nec maledicant aliquem*,<sup>2</sup> which appears in the Court Roll of the Prior and Convent of Durham, but records of regular actions

<sup>1</sup> 2 Inst. 492. Pollock and Maitland suggest that 13 Edw. I might have been a Royal Circular sent to the Judges, *History of English Law*, Vol. II, p. 202.

<sup>2</sup> *Halmota Prioratus Dunelmensis*. Pub. Surtees Society, Vol. LXXXII, p. 132.

for defamation, wherein damages are claimed, and paid to successful plaintiffs.

For instance, in the *Court Rolls of the Lordship of Ruthin*, temp. Edw. I, we find the following: "Marriot, the wife of Walter of Ludlow, complains of Christian Shot for that he defamed her with opprobrious words and called her whore to her loss and shame in 20s. or more. He appears and denies: therefore to the law and because he cannot find pledges therefore by judgment of the Court let him go to the punishment which is called Thewe (cucking stool). Afterward they agreed in such form that the said Christian Shot remains in mercy and is to make amends (6d.)."<sup>1</sup>

Again, we find Anian ap Candlelow complaining that "Mabbc the maid of Sandre of Southwell had upbraided him with disgraceful words and had defamed him. She appears, proves her innocence, and so the said Anian is in mercy for a false complaint."<sup>2</sup>

On 19th June, 1296, "John the mason of Haleston complains of Werwillia of Ruive that she reviled him with abusive words in the common market. The said Werwillia appeared and denied not, therefore she is in mercy and gives 6d."<sup>3</sup>

The following, a combined case of slander and libel, wherein the plaintiff alleges special damage, appears on the *Court Rolls of the Manor of King's Ripton*: "Henry of Swindon complains of John Stalker for that he on the Saturday next before the.....of S. Mary last past, came to Margery, wife of Nicholas Hall, and there defamed the said Henry by saying that he was a thief, a seducer, and a manslayer, and other enormous things and said that he, Henry, slew his (Johns?) son Nicholas, who is really still living, and not content with this, on the Sunday following, sent a letter to Sir Roger of Ashridge clerk of our Lord the King, and Rector of the Church of King's Ripton, in

<sup>1</sup> Cymrodrion Record Series No. 2, p. 15.

<sup>2</sup> *Ibid.*, p. 19.

<sup>3</sup> *Ibid.*, p. 34.

which, he violently defamed the said Henry by the said words and other enormous things written in the said letter, adding, that he was not fit to dwell in the vill of King's Ripton, nor in any other vill, because he is a manslayer and slew his son Nicholas, who in fact is alive, for which cause the said Sir Roger cut off three years from the term which he (Henry) had in the Church of King's Ripton by lease from the said Roger to his detriment 30s. and to his grave damage 20s. and that this is true he produces suit.

"And John Stalker was present and would not defend the words of Court but said that he is not bound to answer because he is not summoned nor attached."<sup>1</sup>

The Court, at the request of the defendant, adjourned to consider this plea, but no subsequent proceedings in the case appear on the Court Rolls.

Hugh Grayling complains of John Dike, "for that the said John slandered him by calling him thief. John comes and defends. The jurors find for Hugh. Damages claimed one halfmark, released all but 6d."<sup>2</sup>

The following case, like that of Marriot of Ludlow on the Ruthin Court Roll, shows that the secular local Courts did, irrespective of any question of local custom, adjudicate on claims for defamation imputing a sin, which, later on, were held to be cognizable by the Courts Christian only.

"It is found by inquest that Rohese Bindibere (3d.) called Ralph Bolay thief and he (3d.) called her whore. Therefore both in mercy. And for that the trespass done to the said Ralph exceeds the trespass done to the said Rohese as has been found, therefore it is considered that the said Ralph do recover from the said Rohese 12d. for his taxed damages."<sup>3</sup>

Now, seeing that in the local Courts a plaintiff who has been defamed could obtain damages for his loss of reputation,

<sup>1</sup> *Select Pleas in Manorial Courts*, p. 116.

<sup>2</sup> *Ibid.*, p. 109.

<sup>3</sup> *The Court Baron*, p. 133.

but if he brought his case in the Court Christian, could only obtain the satisfaction of putting the defendant to penance, and perhaps getting his costs, it appears surprising that defamed parties went into the Ecclesiastical Courts at all.

On the other hand, it must be remembered that the jurisdiction of the Ecclesiastical Courts in defamation was of a quasi-criminal nature, being for the punishment of sin. If Joan called Hugh a cuckold, it did not necessarily follow that it was Hugh who brought Joan up before the Archdeacon or his deputy. In those days the apparitor of the Court was always on the watch for offenders, and probably not a few of the cases one finds in the records came into Court in spite of the plaintiffs. Another reason, which as time went on no doubt helped to add to the number of defamation cases in the Ecclesiastical Courts, was the decline of the local Courts both in number and influence. But the Court Christian was, as it were, at everyone's door, and the lower classes, who supplied the majority of parties in defamation cases, were not in the habit of mincing their words. An angry discussion was sure, sooner or later, to lead to one of the disputants making use of some expression imputing to the other some sin such as these Courts punished. Even if no damages were to be had, there was the satisfaction, such as it was, of seeing your enemy humbled, and apologising in a white sheet, for calling you bad names.

According to the statute Articuli Cleri, 9 Ed. II, c. 4, instead of doing the penance ordered, the defainer was allowed to make a money payment to the prelate, for the Act says, "In defamations, prelates shall correct, the King's prohibition notwithstanding, first enjoining a penance corporal, which if the offender will redeem, the prelate may freely receive the money though the King's prohibition be showed." How far this had the effect of giving the Courts Christian the power to grant damages in cases of defamation,

though in a roundabout way, is by no means clear. We know that by the Canon law penances could be commuted for a money payment, but any sum so paid went into the coffers of the Church.<sup>1</sup> In *Palmer v. Thorpe*, which came before the Queen's Courts in 1583, it seems to be suggested that it was the practice to pay over the commuted penance as damages to the plaintiff in defamation cases, but how far this had been the practice before *Palmer v. Thorpe*, or whether it was ever general, it is difficult to say.<sup>2</sup> Unfortunately, only a few imperfect records of the Ecclesiastical Courts have, up to now, been made public. Thanks, however, to the Surtees Society, we have a tolerable extract from the records of the ecclesiastical proceedings in the Courts of Durham, ranging from 1311—1580.<sup>3</sup> For any purpose of statistics the collection is, of course, of no value, as it is purposely incomplete, and what, perhaps, is still more to be regretted, the results of the cases, which were ready to hand in the Contemporaneous Act Books, were, for some reasons or other, generally omitted. Still, we do get some original records of an Ecclesiastical Court, and, what is more to our purpose, of the causes given, more than forty-five per cent. are cases of defamation. Of the seventy-five cases of defamation extracted from the records, twenty-six are for slanders which could have brought down a prohibition from the King's Court, for they are not for words imputing one or other of the particular sins which these Courts were in the habit of punishing, viz., unchastity, heresy, schism, sorcery, sabbath-breaking, etc., etc.

<sup>1</sup> See *Liber Punitentialis Thcodori*.

<sup>2</sup> In *Palmer v. Thorpe*, it was stated, *inter alia*, that the plaintiff could recover costs in a suit for defamation in the Spiritual Courts, and if the defendant, to redeem his penance, agreed to pay a certain sum, the party might sue for this there, and no prohibition should issue. 4 Coke Rep., 202.

<sup>3</sup> *Depositions, &c., from the Courts of Durham*. Pub. Surtees Society, Vol. XXI. See also Hale's *Precedents in Criminal causes in Ecclesiastical Courts*.

Let us take, for instance, the following case, which came before the Court in the year 1570. It is headed: "The personal answer of Charles Shawe to the libel of Bartram Mytford" (Cf. 96), and reads as follows<sup>1</sup>:—

"He saith that about Wytsday last Bartram Mytford and this examineate, being at certain words about a wheill, he this deponent went over Elvett Bridge, talking thereof with Henry Hirst, sainge that the said Bartram was a covetous snowge and such as he ought by God's worde to be wedyd out of the Common Welth: saying further that ther was none of his the said Bartram's servands but at ther way gayt he was about to make them theives; whereupon one Isabell Hunter, the said Bartram's servant, followed this examineate and answeringe hym that she would tell hir Mr what she had harde hin then speake, he the said Challs said to lyr 'Get thee home, hoore, and tell thy Mr what I have said.'"

Now, it is doubtful whether the words Charles Shawe spoke against Bartram Mytford to Henry Hirst, going over Elvett Bridge, were actionable at Common law, for they amounted to nothing more than vulgar abuse, but it is absolutely certain that they were not properly cognizable in the Ecclesiastical Court, for they did not impute any sin to Bartram Mytford for which he might have been punished, *pro salutae animae*. That Isabell Hunter might have brought him into Court for calling her a whore is true, but he came into Court to answer Mytford's libel only. According to his subsequent confession, he appears to have also called Mytford "beggarly harlot and cutthrote," but these words do not affect the case from an ecclesiastical point. His confession in full reads as follows:—

"A confession to be made by Charles Shawe for slandering Bartram Midsford, in St. Nicholes Church in lynen apparel, after reading of the III Chapter of St. James' Epistle (Swift's Book, f. 174):—

<sup>1</sup> *Depositions, &c.*, Pub. Surtees Society, Vol. XXI, p. 106.

" Beloved neighbours I am now comen hither to show myself sory for slanderinge one Bartram Midford, namely in that I called him openly ' beggerly harlot and cutthrote,' saying that he was ' a covitous snowge, and such as he by Godd's worde aught to be weded out of the Coonenwelthe.' I acknowledge that thus to slander my Christian brother is an heynousc offence, first towardeſ God, who hathe straightly forbyden it in his holy lawes, accomptinge it to be a kynde of murderinge my neighbour and threatninge to punish it with hell fire and the loss of the kyngdomē of heaven. Also the Queen's laws against which I have stubbornely stande, doeth grevously punyſhe all slannderers, backbiters, and sowers of discorde, debate, hatred, and disquietnes, to the shame of offenders, and fear of others. Agayne, my ungruly tonge, if it were not punished, it wolde not onely sc̄i mo of you on fire, but also it would bolden others to doe the like. Wherfore, as I am now called back from mine inordinate d̄oings by this correction, with my cost and shame, so I beseech you all to be witness with me that I am sorry froine the veriq̄y bottone of my harte for this, and my other like offences againſt God, the Quene's Majestic, and the said Bartram Midford; promysinge before God and you here present that I fully intende to amend my outeragious tonge and wilfull behaviour, as may please Almighty God, satisfye the Quene's laws, and tourne to yur good example and myne owne sowle's health; for the obteyninge and performinge thereof I humbly beseche you all, with me and for me, to pray unto God as our Saviour Jesus Christ him self beinge here on earth, taught us, sainge ' Our Father, which art in heaven, hallowed be thy name,' etc."

Appended to this confession is a letter from Mr. Chancellor Swift to the curate of St. Nicholas:—

" Sir William,—When you have admonished the people out of the pulpet, after the Gospell, that Charles Shawe

is ther punished for slandering Bartram Midford then rede ther the third chapter of Saint James Epistle, and that done, let Charles Shawe, being ther in lynn apparel, like a penitent person, say the confession above written, after you, you being in the pulpit, and he kneling benethe the queat dore audiblye, with the Lord's praier to be then, and ther said by him, with all the people knelinge, and that to ask Bartram Midford forgevcnes openly ther and kneling. All which things being done you shall certesfy me againe in writing. 3 March 1570. Certify the next Court daie. Rob Swift."

"Certificate in dorso . . . . knownen to your wurshype that Charles Shawe haith accorden . . . . wurshyppe commondement, in our parish's churche, barfett and barebed . . . . upon his knees, upon Easter day last, and ther dyd aske Bartrame Midforthe forgevencs, in the fayse of all the congregation ther present. Wryting by me William Hedlame, curett of St. Nychelas in Duriame."

I have given the above case in full because it is a rare example of proceedings, from beginning to end, in a case of defamation in the Ecclesiastical Courts. The case is undoubtedly one that the Queen's Courts could have prohibited. However, judging from the cases in the Durham records up to 1584, it would seem the Ecclesiastical Courts tried cases of defamation irrespective of whether they were properly cognizable or not.

Thus, Marion Armourer is cited for calling William Redeman a horse stealer; John Ellesdon for saying Ednam was a thief, and had stolen his father's dun-coloured mare; Thomas Angessyd for saying that Alexander Tailyer had murdered his son; Mathew Wilson for saying that John Stokall "should fest the feet and the head of another man's meir" (*i.e.*, so that the mare would not be able to graze); Robert Faucus for saying that Thomas Chicken had the "fawling sickness"; Dorothy Robinson for saying Agnes

Parker "came more likelye to steill a pig, than to see them"; Cuthbert Newton for saying Willsam Whitskails "should steill fyve barrells of hering"; Marion Hall for saying Christopher Richester was "a yawdesteiller" (*i.e.*, a horse stealer); John Stobbs for saying in the County Court at Alynwick, that Roger Foster, who was brought as a witness, was a perjured person; Janet Arunstrong for saying that John Hall had "murdered and put down his two wyfes"; Alice Robinson for saying that Alexander Fetherstonhaugh was a thiefl, and would be hanged, as "all his fore ellers (ancestors) was": Janet Nerand for saying that Agnes Reid had "sett dogs of hir brother-in-law Thomas Reid's children"; Alice Atkinson for saying Fortune Car had stolen one silver spoon (Fortune is 13 years old, so comes into Court by her stepfather, Ralph Burrell); Robert Hasley for saying that Magdalen Robson "should teir a cheffe and a neckurcheffe of a dycke (hedge)"; Isabell Hedley for saying Janet Cooke had stolen a purse at John Newton's; Martin Atchuson for saying that Jasper Arkle "had wittinglye solde one stolne shepe skyn in the town of New Castell"; Alice Stokoo for saying Peter Richerdson and Isabell his wife "had stole a silver whistell"; John Wright for saying "Laurenc Dawgleis was a Skott"; Margaret Sewell for calling Giles and Gerard Hearon "Scottes Martyn sonnes"; Elinor Aunderson for saying that Leonard Tayler was "a gouse and a hen thief and all his"; Micheson for saying that "yf he had a wyfe of the condition of hir dam (*i.e.*, William Monkchester's wife) he had rather ther wer a milston about his neck in the bottom of Tyne"; John Snawdone for calling Christofer Bowham a thief; Anthony Ludley for calling George Barrow "fals knave"; Stephen Nicholson for saying Edward Younger "dyd eat fyve stoln geis all upon one day in his house and kept his door spaired at tymc they were eating"; and Peter Tailer for saying of Willium Whitmore that he was "an unductiful and an

unlawful subject, and that he was run away when he should serve his prince."<sup>1</sup>

In the above twenty-six cases, not one of them comes within the definition which was supposed to give the Ecclesiastical Courts jurisdiction in defamation, viz., that the words spoken imputed to the person defamed a sin punishable by the Courts Christian. The great majority of the cases are those imputing theft, two imputed murder, one perjury, and one assault, while the rest of the cases impute offences neither cognizable by the Ecclesiastical nor the King's Courts. Probably, until the close of the 16th century, in matters of defamation, the Ecclesiastical Courts did pretty much as they chose. By this time, however, the King's Courts were beginning to exert their authority, and began to prohibit suits for defamation which were not strictly in order.

The subsequent history of defamation in the Ecclesiastical Courts may be summed up as a gradual curtailment of their jurisdiction by the King's Justices. Throughout the 18th century, to the majority of lawyers at least, save in matrimonial, testamentary, and Church matters, the Ecclesiastical Courts must have seemed an anomaly. They had practically ceased to punish for sin, and cases of defamation were rare indeed at the beginning of the 19th century. It was, however, not until the year 1855 that the jurisdiction of the Ecclesiastical Courts over defamation was finally abolished by Statute. Like the jurisdiction over wills, that over defamation got into the hands of the Church mainly through the King's Courts refusing relief, and remained there for centuries. Even at the present day we can trace the effects of this in the somewhat curious distinction which our law makes between libel and slander.

ARTHUR CLEVELAND.

<sup>1</sup> Pub. Surtees Society, Vol. XXI.

### III.—HOUSEHOLDER'S LIABILITY FOR DAMAGE CAUSED BY FALLING TILES, ETC.

IT is always surprising to find how little authority there is to determine the legal responsibility for many of the ordinary occurrences of daily life. The occurrence with which this article treats is supposed to be this:—A passer-by is walking down a street on, perhaps, a windy or snowy day, and a tile, or a chimney-pot, or piece of gutter from a house, falls upon him and injures him; has he any claim in damages against the occupier of the house, and if so, upon what grounds?

It is assumed throughout this article that the occupier of the house is the freeholder, so as to avoid the complication of any question arising as between landlord and tenant.

There is some uncertainty as to the law which determines the liability of the occupier of the house in these circumstances. The uncertainty arises from the decision in the case of *Tarry v. Ashton*.<sup>1</sup> There is, however, a recent decision in the Irish Courts,<sup>2</sup> in which the identical facts in question were dealt with, and in which *Tarry v. Ashton* was distinguished; but, until we have an authoritative English decision which either approbates or reprobates the Irish case and explains clearly the grounds of the decision in *Tarry v. Ashton*, it will not be possible to dispose of the view taken by some of the English text-books.

The facts in *Tarry v. Ashton* were these:—A heavy lamp was suspended from a house by an iron bracket projecting over the highway. The lamp fell and injured a passer-by. The occupier of the house knew of a defect in the bracket and employed a “contractor” to repair it, who, however, failed to effect a proper repair to a flaw in the iron. A

<sup>1</sup> [1876], 1 Q. B. D. 314.

<sup>2</sup> *Palmer v. Batchman* ([1908], 2 Ir. R. 393).

Court composed of three judges—Blackburn, Lush and Quain, J.J.,—unanimously decided in favour of the plaintiff, but based their judgments upon different grounds. It seems that Blackburn, J., rests his decision either upon the ground of negligence or of nuisance; while the other two judges use language which may imply that they regard the occupier of the house as being under an absolute duty to see that no injury befalls passers-by.

In the Irish case (*Palmer v. Bateman*) a piece of gutter fell from the roof, owing to the rusting through of a screw, and injured a passer-by. The occupier knew of no defect, and there was evidence of due diligence on his part: the gutters were cleaned out every two years, and in the year previous to the accident the roof and gutters had been twice properly inspected. A Court of First Instance, a Divisional Court and the Irish Court of Appeal, all found in favour of the defendant.

It will be necessary, therefore, to discuss the possible liability of an occupier of a house in the circumstances described at the beginning of this article under the heads of (a) negligence, (b) nuisance, (c) absolute responsibility, and see how far *Tarry v. Ashton*, the Irish case, and the view taken by the English text-books, can be reconciled with each other.

In the first place, any abnormality of climatic conditions—heavy rain, snow or wind—can be easily dealt with.

“Act of God” is some cause due to natural causes directly and exclusively without human intervention, and such that could not have been prevented by any amount of foresight and pains and care reasonably to be expected<sup>1</sup>; and even should climatic occurrences amount to Act of God, an Act of God only excuses, if it is the immediate cause of the damage.<sup>2</sup>

<sup>1</sup> *Nugent v. Smith* ([1876], 1 C. P. D.), at p. 444.

<sup>2</sup> *Nichols v. Marsland* ([1875], L. R. 10), Ex. 255.

But it may be said, surely weather is material, at all events as regards negligence, for the amount of care to be required depends upon the weather to be reasonably expected? It will appear, however, from what is said below, that we are dealing with due diligence in keeping in repair, and not, at any rate, as far as negligence is concerned, with avoiding results. A building so flimsy as to be dangerous in bad weather might constitute a nuisance, and as to a latent defect brought to light by bad weather, liability for that would depend upon the kind of duty there is upon the occupier, which is about to be discussed in this article.

First, then, as to negligence on the part of the occupier. It is clear, even without the Irish case, which expressly turns upon the question of negligence or no negligence, that the occupier of a building is responsible for any damage caused by negligence. It is a well-settled principle of the Law of Torts that everyone is bound to exercise due care towards his neighbours in his acts and conduct, and if a man has been negligent in keeping the roof of his house in repair, there is no difficulty in making him responsible for any injury caused by his neglect—“*Sic utere tuo ut alienum non laedas.*” If an accident has happened, the plaintiff will succeed unless defendant can prove due diligence.<sup>1</sup> In other words, the accident will be *prima facie* evidence of the accident, and will shift the burden of proof on to the defendant, and in the absence of proof by the defendant of his diligence, there is no need for the plaintiff to prove negligence by the defendant; but the plaintiff will not succeed if the defendant does in fact prove due diligence.<sup>2</sup>

<sup>1</sup> *Scott v. London Dock Company* (3 H. & C. 596); *Keagney v. L.B. & S.C. Ry.* ([1870], L. R. 5, Q. B. 411); ([1871], L. R. 6, Q. B. 759).

<sup>2</sup> *Palmer v. Bateman* ([1908], Jr. R. 393), qualifying the statement in *Pollock on Torts*, 8th Ed., at p. 517, as to the application of the principle “*res ipsa loquitur*.”

The occupier will be responsible, according to the well-known principle of tort, for the negligence of his servant, and *Tarry v. Ashton* must at any rate be taken as authority for saying that if the occupier knew of any defect, or if he ought to have become aware of any defect by proper inspection, employing a contractor to make repairs, who in fact fails to do so, will not relieve the occupier from liability.

But suppose the defendant can prove due diligence, is that an end of the matter, and is the plaintiff bound to fail in his action? If the Irish case of *Palmer v. Bateman*<sup>1</sup> is correctly decided, the answer must be in the affirmative, and the Irish case must be good law, unless it is possible to substantiate liability on either of the other two grounds above mentioned—nuisance or absolute responsibility.

First, as regards nuisance.

It may be that Blackburn, J., in *Tarry v. Ashton*, rested his judgment on the grounds of nuisance. That nuisance was in his mind is shown by his question during argument: "Was the lamp in such a state as 'to be a nuisance, if so, was it to the knowledge of the defendant?'" In his judgment in that case he says that the occupier is liable "if he discovers the defect and does not cure it" or "if he did not discover what he ought on investigation to have discovered." Compare with this the responsibility for nuisance as stated in *Barker v. Herbert*,<sup>2</sup> where it says: "There can be no liability upon the part of the possessor of land, unless it is shown either that he himself or some person for whose action he is responsible created that danger which constitutes a nuisance to the highway, or that he has neglected for an undue time after he became aware of it, or, if he had used reasonable care, ought to have become aware of it, to abate or prevent the danger or nuisance."<sup>3</sup> And, again, "He cannot be said to have

<sup>1</sup> *Supra*.

<sup>2</sup> L. R. [1911], 2 K. B. 633.

<sup>3</sup> Vaughan Williams, L.J., at pp. 636-7.

"permitted the continuance of that which was not caused by him and of which he had no knowledge."<sup>1</sup>

There are *dicta* in *Barker v. Herbert* to the effect that in *Tarry v. Ashton* there was something abnormal about the building, and doubtless the Irish case was quite correct in distinguishing the facts in the case before them from those in *Tarry v. Ashton*. Lord O'Brien, L.C.J., says, in the Irish case: "In the present case nuisance is not alleged as a cause of action, nor, in my opinion, could it have been . . . . . Certainly the house in its original construction, with gutter attached, did not constitute a nuisance; and I think it is equally certain that when a piece of gutter fell, it was not a nuisance . . . . . 'If,' said Lord Blackburn, in *Tarry v. Ashton*, 'the defendant knowingly maintained his house in a dangerous state, he would be indictable for the nuisance.' . . . . But in all common sense, could any such description apply to the defendant's house; and there is no evidence whatever, that the defendant knew about the condition of the gutter."

However the facts may have been in the Irish case, it is not difficult to see that in slightly altered circumstances, the occupier might be liable for nuisance. There is little abnormal in a heavy lamp suspended over the highway and not much "conspicuous tumble-down" about a defect in an iron bracket, and it might well be that a badly-designed gutter or knowledge of a defect rendering the gutter dangerous might constitute it a nuisance.

Secondly, as regards absolute responsibility.

Whatever ground Blackburn, J., rested his decision on, he excluded liability for latent defects. "As I have said, 'I do not wish to decide more than is necessary; and if there were a latent defect in the premises, or something done to them without the knowledge of the owner or

<sup>1</sup> Fletcher Moulton, L.J., at p. 643.

"occupier by a wrong-doer, such as digging out the coals underneath and so leaving a house near the highway in a dangerous condition, I doubt—at all events, I do not say—whether or not the occupier would be liable" (p. 319). In other words, Blackburn, J., was very doubtful whether there was an absolute duty on the occupier of a house to prevent damage to innocent third parties. It is not at all certain, however, that such a view of the case was taken by the other two judges. Lush, J., says: "The question is, what is the duty of a person having a lamp projecting from his premises over the highway for his own purposes? Is it his duty to maintain it in a safe state of repair, or only to employ a proper person to put it in repair? Surely the mere statement is enough to show that the duty is in the first proposition. A person who puts up or continues a lamp in that position puts the public safety in peril, and it is his duty to keep it in such a state as not to be dangerous," and Quain, J., says: "So here the duty of the defendant was to keep the lamp in repair, so as not to let the public be prejudiced."

In *Clerk and Lindsell on Torts*,<sup>1</sup> it says, in discussing *Tarry v. Ashton*: "The language of the majority of the Court suggests that that duty extends even to latent defects. So if a brick or stone falls out of the wall of a building, or a tile or chimney-pot from the roof, the owner of the premises will probably be responsible for any damage that may be caused thereby, irrespective of any question of negligence."<sup>2</sup> It is to be noted that neither books refer to the Irish case, although Clerk and Lindsell cite a case—the only English authority at all similar—of *Morgan v. Hart*, reported very shortly in *The Times* of the 27th of November, 1888, where the plaintiff

<sup>1</sup> 1912, Ed., p. 475.

<sup>2</sup> And compare *Addison on Torts*, 8th Ed., p. 894.

had sustained injuries from the fall of a sign-board outside the defendant's shop on an exceptionally windy day. In *Morgan v. Hart* the plaintiff lost his action, and in the Court of Appeal counsel for the defendant was not even called upon to argue, but the report does not give the grounds of the decision.

The Irish case is, however, most explicit on this head of liability: "I don't think it can be said that the owner of a house warrants to each member of the public that 'it is an absolutely safe condition of repair.'<sup>1</sup> Again: "It would be contrary to principle and to common sense to hold that a person in the position of the defendant, who has just come into possession of a house, knowing nothing of his defect and trusting to the ordinary supervision by workmen, which appears to have taken place every year or two years, should be held liable for an accident happening in this way."<sup>2</sup>

It will be noted that in neither of the above quotations is any reason to be found for the statements made. The whole point is whether the rule in *Rylands v. Fletcher*<sup>3</sup> applies or not to the facts in question. The rule in *Rylands v. Fletcher* is usually explained by saying where a man artificially collects anything—not necessarily in itself dangerous—upon his land, he is responsible for any damage done thereby. In *Clerk and Lindsell*<sup>4</sup> it says: "The question whether that principle [*Rylands v. Fletcher*] does or does not extend to the escape of solid bodies cannot be regarded as definitely settled, though to hold that it does not would necessarily involve a surrender of logical consistency." But it seems doubtful whether for the sake of logical consistency such an obligation ought to be imposed upon the occupier of a house in the circumstances in which a modern town is built; and it is probable

<sup>1</sup> Lord O'Brien, L.C.J., at p. 399.

<sup>2</sup> L.R., 1 Ex. 265.

<sup>3</sup> Wright, J., at p. 402.

<sup>4</sup> 1912, Ed., p. 476.

that the English Courts would adopt the same rule as the Irish Courts.

At all events, until the Irish case is followed or departed from by the English Courts and until the basis of the decision in *Tarry v. Ashton* is authoritatively explained, there must always be some doubt about the law.

R. R. FORMOV.

#### IV.—REPRISALS IN WARFARE.

THE present calamitous situation in Europe has brought once more to the fore many questions of International law, which some of us fondly hoped would not require discussion again as practical problems connected with a great war. Although, as a result of the present conflict, a number of principles will doubtless have to go into the melting-pot and be recast, yet it may be of some value, or, at least, of some interest, to consider what has hitherto been regarded as the law on that method of securing legitimate warfare known as Reprisals. This subject has met with a large amount of discussion during the past months, consequent on the action taken by the British Government, in conjunction with the other Allies, to retaliate upon Germany for the latter's continued disregard of the laws and customs of war, and, in particular, for Germany's action in sinking at sight British merchant vessels without regard to the fate of the crews. Other breaches committed by Germany are enumerated by Sir Edward Grey in his Memorandum to the United States Ambassador on 15th March, and include the inhuman treatment of the inhabitants of Belgium and Northern France, the barbarous treatment of British soldiers who are detained as prisoners of war, the bombardment of undefended towns such as Scarborough, Yarmouth and Whitby,

and the indiscriminate dropping of bombs by German aircraft on undefended portions of the East Coast. Into the details of the controversy it is not proposed to enter, as they are fresh in the minds of all. The position with regard to the illegal action of Germany, which brought matters to a climax, is summarised by the Declaration communicated by the British Government to neutral countries early in March. This Declaration is as under:—

Germany has declared that the English Channel, the north and west coasts of France, and the waters round the British Isles are a "war area," and has officially notified that "all enemy ships found in that area will be destroyed, and that neutral vessels may be exposed to danger." This is in effect a claim to torpedo at sight, without regard to the safety of the crew or passengers, any merchant vessel under any flag. As it is not in the power of the German Admiralty to maintain any surface craft in these waters, this attack can only be delivered by submarine agency. The law and custom of nations in regard to attacks on commerce have always presumed that the first duty of the captor of a merchant vessel is to bring it before a Prize Court, where it may be tried, where the regularity of the capture may be challenged, and where neutrals may recover their cargoes. The sinking of prizes is in itself a questionable act, to be resorted to only in extraordinary circumstances and after provision has been made for the safety of all the crew or passengers (if there are passengers on board). The responsibility for discriminating between neutral and enemy vessels, and between neutral and enemy cargo, obviously rests with the attacking ship, whose duty it is to verify the status and character of the vessel and cargo, and to preserve all papers before sinking or even capturing it. So also is the humane duty of providing for the safety of the crews of merchant vessels, whether neutral or enemy, an obligation upon every belligerent. It is upon this basis that all previous discussions of the law for regulating warfare at sea have proceeded.

A German submarine, however, fulfils none of these obligations. She enjoys no local command of the waters in which

she operates. She does not take her captures within the jurisdiction of a Prize Court. She carries no prize crew which she can put on board a prize. She uses no effective means of discriminating between a neutral and an enemy vessel. She does not receive on board for safety the crew of the vessel she sinks. Her methods of warfare are therefore entirely outside the scope of any of the international instruments regulating operations against commerce in time of war. The German declaration substitutes indiscriminate destruction for regulated capture.

Germany is adopting these methods against peaceful traders and non-combatant crews with the avowed object of preventing commodities of all kinds (including food for the civil population) from reaching or leaving the British Isles or Northern France. Her opponents are, therefore, driven to frantic retaliatory measures in order in their turn to prevent commodities of any kind from reaching or leaving Germany. These measures will, however, be enforced by the British and French Governments without risk to neutral ships or to neutral or non-combatant life, and in strict observance of the dictates of humanity.

The British and French Governments will therefore hold themselves free to detain and take into port ships carrying goods of presumed enemy destination, ownership, or origin. It is not intended to confiscate such vessels or cargoes, unless they would otherwise be liable to condemnation.

The treatment of vessels and cargoes which have sailed before this date will not be affected.

It is proposed in this short article to consider the nature of reprisals and their justification, and then to look briefly at the position of neutrals.

Writers on International law distinguish two kinds of reprisals. There is, first, the kind of reprisals used by one State against another State with which the former State does not desire to go to war, but where, nevertheless, there are grievances for which redress cannot be obtained without some measure of force. Professor Westlake describes this procedure as pressure put upon one State by another, with a view

to securing the redress of a wrong alleged to have been done by it or by one of its subjects.<sup>1</sup> Such measures may take the form of the seizure of the property of the State or its subjects, or even of violence exercised against such State; indeed, in so far as the State against which they are directed is concerned, they are exactly the same kind of acts as would be resorted to in war. But the parties do not choose to regard themselves as belligerents, and diplomatic relations continue between them; there is no intention of making war.<sup>2</sup> But, be it noted, the Power against which such reprisals are directed, may retaliate by declaring war. One illustration must suffice. In 1908 the Dutch captured two Venezuelan coastguard ships in order to compel the cessation of various grievances when diplomatic means had failed. Wheaton aptly describes such reprisals as "a kind of international set-off."

The other kind of reprisals are those with which this article deals, viz., reprisals in warfare. Professor Oppenheim defines these latter as "retaliation of an illegitimate act of warfare, whether constituting an international delinquency or not, for the purpose of making the enemy comply in future with the rules of legitimate warfare."<sup>3</sup> It will at once be seen that this is an application of the *Lex Talionis*, or repayment of evil for evil.

At the outset it is desirable to point out a distinction, emphasised by Professor Oppenheim, between those violations of the laws of war committed by members of the enemy forces by order of the belligerent government, and similar violations committed by such persons without any order of the government. It is in the former case that resort may be had to reprisals. In the latter case, but not in the former (according to Professor Oppenheim), the perpetrators

<sup>1</sup> *International Law*, Part II, p. 8.

<sup>2</sup> Lawrence, *International Law*, p. 336.

<sup>3</sup> *International Law*, Vol. II, p. 305.

themselves may be punished by the enemy as guilty of war crimes.'

If one belligerent is guilty of violations of the recognised laws of civilised warfare, what can the other belligerent do but resort to repayment in kind? Protest, of course, should first be tried, but if that is of no avail, there can be nothing for him to do but to exercise force of the same kind as that used by his opponent.

Although there is practical agreement among jurists that retaliation in warfare may justify some acts of force exercised by one belligerent against the other which would otherwise be condemned, there is no unanimity on the question of the justification for such acts. Wheaton states that "the whole international code is founded upon reciprocity," and Taylor, quoting this *dictum*, adds that, therefore, if an enemy violates the established usages of war, it may become, not only the right, but even the duty of his adversary to retaliate so as to prevent further excesses. Taylor adds that retaliation should consist of a repetition of the same or similar acts, and, so far as possible, should be inflicted upon the actual wrongdoer.

The German jurist Lueder, in discussing the subject, made the somewhat extraordinary statement that the right not to observe the laws of war exists, because, according to known maxims, non-fulfilment by one party deprives that party of the right to claim fulfilment by the other.<sup>1</sup> Commenting on Lueder's opinion, Westlake says, "we must record our dissent from the generality of the assertion that a mutual obligation is dissolved by the failure of one party to perform it. If the mutual obligation under which we all lie to obey the law of the land in what concerns one another is intended, it is certain that the lawless behaviour

<sup>1</sup> Cf. Oppenheim, *International Law*, Vol. II, ch. vi (4).

<sup>2</sup> *International Law*, p. 488.

<sup>3</sup> *A Holzenhoff Handbuch*, 255.

"of our neighbour towards us does not authorise us to "behave lawlessly towards him, but only calls for redress." Dr. Westlake discusses the matter at some length, and admits that universal practice and consent have allowed a breach of the laws of war by one belligerent as retaliation for a breach committed by the other belligerent. He further allows that the permitted reprisal is *not* limited to one of the same kind of law which has been broken, herein differing from the opinion of the American jurist Taylor quoted above. Dr. Westlake reaches the conclusion that "the true basis of the right of reprisal in warfare seems to "be, not the impairing of any obligation, but the redressing "by punishment or the exaction of damages of a violated "obligation." Further, in his view, the illegalities of the opposing side do not permit a State to become free from the law, but only gives that State a right to vindicate International law by fitting punishment or the exaction of fitting remedies.

Whilst, as Professor Oppenheim says, reprisals between belligerents are terrible means, because in many cases directed against innocent persons, yet it is easy to see that they cannot be dispensed with, because without them illegitimate acts of warfare would be far more common than they are at present, and would be practically incapable of prevention. Every member of the enemy forces is cognisant of the fact that if he or his fellows violate the rules of warfare, reprisals may be exacted, and this knowledge undoubtedly acts as a deterrent where nothing else would.

Taylor, from whom we have already quoted, gives some interesting historical instances of retaliation in warfare, beginning with the examples of Alexander, who told Darius that if he continued to wage war without quarter he would himself be refused quarter, and of Scipio, who told the Spanish princes that they themselves, and not hostages,

would be held responsible for their acts. Again, the destruction of Carthage by the Romans may be considered as an act of retaliation for the injury done to the Roman ambassadors; and the execution of the Athenian prisoners by Lysander because of Athenian cruelties may be placed in the same category. Coming down to more recent times, it may be recalled that in the American Civil War General Early burnt Chambersburg by way of retaliation for the destruction of property in the Virginia valley. Again, when, in the course of that terrible conflict, the Union Government liberated the Southern slaves and enrolled them in the army, the Confederates declared that they would treat such combatants as runaway slaves, and grant them no quarter. President Lincoln answered that if they acted in this way he would execute Confederate prisoners in retaliation.<sup>1</sup> Taylor condemns as unjustifiable the sacking and burning of the Chinese Emperor's Palace in 1860 in retaliation for Chinese cruelty to Europeans.<sup>2</sup> One further instance—quoted by Oppenheim<sup>3</sup>—is that during the Franco-German War the French had captured forty German merchantmen and made their captains and crews prisoners of war. Bismarck demanded their liberation, and when France declined to accede to his demand, ordered by way of reprisal forty French private individuals to be arrested and detained as prisoners of war. Bismarck was here undoubtedly wrong, as at that time there was no breach of the laws of war in France's act in detaining the seamen, so that no case for reprisals had been made out. The case is useful, however, as illustrating Germany's recognition of the legitimacy of reprisals in warfare.

The matter of reprisals has not been dealt with by any of the great law-making conventions, held at the Hague and elsewhere, although the matter would seem to fall within the declaration of the Hague Conference of 1907, that "in cases

<sup>1</sup> *International Law*, p. 489.

<sup>2</sup> *Ibid.*, p. 490.

<sup>3</sup> Vol. II, p. 308.

"not included in the Regulations . . . populations and belligerents remain under the protection of, and rule of the principles of the Law of Nations, as they result from the usages established between civilised nations, from the laws of humanity, and the requirements of the public conscience."<sup>1</sup>

In the Manual of the Laws of War adopted by the Institute of International Law, Article (86) provides: "In the grave cases in which reprisals become an imperative necessity, their nature and scope must never exceed the measure of the infraction of the laws of war committed by the enemy."

It will readily be admitted that the right to resort to such retaliatory means as reprisals is one which needs to be exercised by the injured belligerent with the greatest care. Very full and careful enquiries ought to be made, and the law of war which, it is alleged, has been broken should be one which has been fully recognised as binding on the belligerents. The need for great caution in exercising this right is apparent when it is considered that the victims of reprisals will in almost all cases be not the actual perpetrators of the breach but innocent persons, such as prisoners of war detained in the power of the side resorting to reprisals.

One further point demands notice, and that is, that whilst reprisals in time of peace are admissible only in the case of actual international delinquencies, reprisals in warfare are admissible for every kind of illegitimate act of warfare, whether an international delinquency or not.

Mr. Balfour has written a defence of the Allies' reprisals by the blockade of Germany, and in the course of his remarks he urges that the Allies' action is justified by Germany's breach of International law in torpedoing any merchant ship believed to be British without regard to life or to ownership of cargo and without any pretence of a

<sup>1</sup> Convention concerning the Laws and Customs of War on Land, 1907.

legal investigation. In reply to the attitude assumed by some writers (such as Dr. Westlake, quoted above), that the crime of one party does not justify the other party in violating the law of nations, Mr. Balfour reminds his readers that international morality is a different thing from International law, and can only be binding if observed by both parties, i.e., can only be binding if there is reciprocity.<sup>1</sup> Finally, Mr. Balfour lays stress upon the mildness of the measures adopted by the Allies, and this will readily be admitted if we compare such methods with the acts of the Germans in the Franco-German War, when they frequently burnt undefended villages by way of reprisal, or even with the acts of Lord Roberts in the South African War, when he burnt farmhouses for the same end.

On the question of the legality of reprisals in warfare, therefore, we may conclude: (1) they have been recognised through all the ages as a means of securing legitimate warfare; (2) they ought not to exceed in severity the evil sought to be redressed; (3) while it is eminently desirable that the persons to suffer from reprisals should be the actual wrongdoers, yet this is not a *sine qua non*, and innocent persons may be made the victims.

In conclusion, let us glance for a few moments at the position of neutral countries. To what extent must they submit to the measures of retaliation adopted by Great Britain and her Allies against Germany? Although A. may have the right as between himself and B. to vindicate a right which B. has violated and to punish B. for such violation, yet it will at once be conceded that if A. by his action towards B. injures C., C. has a good ground of complaint. As between the belligerents themselves, the necessity for reprisals is the justification for the resort to them, and no one who has read the Declaration made by Great Britain on March 1st and communicated to neutrals

<sup>1</sup> Cf. Wheaton's opinion quoted above.

(set out above), and the Reply of Sir Edward Grey to the United States Ambassador on March 15th (in which the various violations by Germany of the laws of civilised warfare are summarised), will deny that Great Britain and her Allies have had ample reasons for the policy of Reprisals upon which they have embarked.

Granted, then, that the necessity for reprisals is the justification for the resort to them, it is desirable to point out that by such measures innocent neutrals must not be injured. Neutral countries must, of course, submit cheerfully to many inconveniences during a great war, but, as pointed out by the United States Government, in their Note to Great Britain of April 2nd, while the changed conditions of naval warfare are recognised, it should still be possible to conform to the spirit of the rules of warfare, and, further, that if serious interruptions of neutral trade occurs, the British Government is expected to make full reparation for any violations of neutral rights. This will doubtless be done.

W. E. WILKINSON.

## V.—GLEANINGS FROM OLD SCOTS LAW.

### I.—THE LAW OF DEATH-BED.

FROM a very early date down to the year 1871 one of the most curious features of the Scottish legal system was the existence of what was technically called the Law of Death-bed. This was the right possessed by the heir to have set aside any gratuitous disposition to his detriment by his ancestor if the deed whereby this was effected was executed during the illness of which the grantor died, unless, indeed, after its execution the grantor performed one or other of two acts which were held to imply convalescence. A deed set aside under this doctrine was said to be reduced *ex capite*.

*lecti.* Whether the real underlying motive of its introduction was to secure the tranquillity of the ancestor's last hours, or whether it was solely to protect the interests of the heir-at-law, or whether both reasons may have operated, has been much discussed; but, whatever the *raison d'être* of the doctrine, it was the heir, or those claiming under him, who in fact challenged the deeds of the ancestor which were executed when the latter was not in "liege poustie," as the phrase ran, this being a corruption of *legitima potestas*. The odd thing about the working of the law of death-bed was that till 1696 no evidence of convalescence was receivable except attendance, unsupported, at either kirk or market. The grantor might have exhibited indubitable signs of physical strength, but it would be of no avail to save the deed, in the absence of proof that he had done one or other of the two things mentioned—attended kirk or market—these being the two places of public resort in each locality where there were likely to be witnesses who could testify as to each person's appearance and conduct.

The phrase "at kirk or market" was one in common use in Scotland of a by-gone day, as appears from some of Burns's poems and songs. Attendance at kirk or market being for this purpose the sole evidence of health, it naturally became in each instance the desire of the grantor of the deed, or rather of those who had persuaded him to its execution and who would benefit by its provisions, to see that he attended one or other of these places of resort in order to validate the deed; and frequent attempts were made to satisfy the requirements of the law on this head by getting him to attend kirk or market when no one was about, and when, therefore, no means of checking the accuracy of the allegation of attendance were at hand. In order to prevent any such merely formal compliance with the letter of the law and disregard of its spirit, the judges of the Court of Session promulgated, in 1692, an Act of

Sederunt; i.e., an Order of Court, in these terms:—“The Lords of Council and Session taking to their serious consideration, that the excellent law of death-bed, securing men's inheritance from being alienate at that time, may happen to be frustrate and evacuate (*sic*) if their coming to church or mercate be not done in such a solemn manner, as may give some evidence of their convalescence, without suppota-  
tion or straining of nature: And seeing some, may think it sufficient, if parties, after subscribing such dispositions, come to the church at any time, and make a turn or two therein, though there were no congregation at the time: And likewise, if they make any merchandize privily in a shop or cranc, or come to the mercat-place, when there is no publick mercate; and all this performed before their own pickt out witnesses, brought along by the party in whose favours the disposition is made, that the state and condition of his health or sickness may be as little under the view and consideration of other indifferent persons as can be; the occasion of which mistake might have been, that formerly there were publick prayers, morning and evening, in the church in many places, to which those who apprehended any controversie might arise upon the validity of their dis-  
positions, were accustomed to come at the time of prayer; and some thought they might come to the church, though there were no publick meeting thereat, since these publick prayers were not accustomed, and to take instruments of their appearing there: For remedie whereof, the Lords declare they will not sustain any such parties going to church and mercate, where it is proven that he was sick before his subscribing of the disposition quarrelled, as done *in lecto*, unless it be performed in the daytime, and when people are gathered together in the church or church-  
yard for any publick meeting, civil or ecclesiastick, or when people are gathered together in the mercate-place for publick mercate. And further declares, whensover

instruments are taken for the endforesaid, that the said instrument do expressly bear, that it was taken in the audience and view of the people gathered together, as aforesaid, otherways the Lords will have no regard to the said instrument."

Public, as distinguished from mere private, attendance at kirk or market was thus formally made essential. But more was required: the attendance must have been unsupported, and it was upon this point that in a number of cases interesting questions arose. In the *Laird of Luss v. Carden*,<sup>1</sup> in 1685, the deceased whose deed was impugned on the ground of death-bed had gone to church in his coach accompanied by his wife, but some witnesses thought they detected her supporting him. It further appeared that before setting out for church he had taken a glass of sack as a cordial. Four days after having attended church, he went in a coach to a shop where he bought some golf balls—apparently he had been a keen golfer—but on this occasion the evidence was clear that he had been supported. Those maintaining the validity of the deed were thus forced to rely on the attendance at church. Whether his wife had supported him or not was, of course, a question of fact, but in reference to the allegation that, before setting out for church, he had taken a glass of sack, it was answered, and surely with some reason, that "the taking of a glass of sack was proper enough to the party at his going abroad to hear a long sermon though he had not been sick." In the result the Court found that the deed had been executed on death-bed, and must therefore be set aside, their Lordships adding, "that the exercising acts of health and strength for validating rights, by the help of coaches, sedans, or leading ladies, are used but as blinds to cover weakness, and subject to a suspicion which was rational for the party to prevent, had he been able."

<sup>1</sup> *Morison's Dictionary of Decisions*, 3350.

One of the most interesting of the numerous cases on this subject was that of *Creditors of Lord Balmerino v. Lady Coupar*,<sup>1</sup> decided in 1671, and referred to with some additional details in Riddell's *Scottish Peerages*, Vol. I., pp. 85 *et seq.* As illustrating not only the operation of the rule of law with which we are concerned, but likewise providing a curious story of the machinations of a young and ambitious wife to secure her own ends, the facts may be stated somewhat fully. It appears that Lord Coupar, the younger son of the first Lord Balmerino, and the godson of James VI, when approaching eighty, "had the misfortune," as the person who drew the pleadings cynically put it, to marry a young wife who in due time inveigled him to execute a conveyance of his honours and estates upon an Exchequer resignation in favour of herself, "and any whom she should please to marry." It was a neat scheme, but, unfortunately for its success, Lord Coupar was labouring under a mortal malady at the time he executed the deed. As it was foreseen that it would in all probability be challenged on the ground of death-bed, Lady Coupar, in order to counteract this, resolved that her husband should attend the kirk, and, to make assurance doubly sure, market as well. On the Thursday following the execution of the deed the aged nobleman was at Coupar Angus market, and on the next Sunday he was at the parish church. Very shortly afterwards he departed this life. A suit was at once instituted by Lord Balmerino, the next heir, in the name of his creditors, to have the deed reduced *ex capite lecti*, and in that action it was admitted that Lord Coupar had, in fact, attended both kirk and market, but it was said that on each occasion he was supported "under the oxter or by the elbow," and it was further alleged that when at the kirk he sat in a pew near the door, being unable to reach his own, "and the whole people who beheld him looked on him as a

<sup>1</sup> Morison's *Dictionary*, 3292.

dead man." It was further said that on his return from the service "he was not only supported, but having swearved and foundered, he was carried into his house in an armed chair, when he had almost expyred had not brandy and cannell wine revived his spirits, which was poured in at his mouth, his teeth being holden open with a knyfe." Lady Coupar was forced to admit that her husband had been supported to and from the church, but she explained that this was owing, not to weakness on his part, but to the accidental storminess of the day, which, she declared, was so violent as to break the kirk bell. A bad day certainly to choose for taking an old man to church! She also endeavoured to prove *aliunde* that the deceased had quite recovered from his illness, but to no purpose; on the evidence the Court was satisfied that Lord Coupar had not attended either kirk or market unsupported since the execution of the deed, and therefore that it must be set aside. Having won his action, we are told that Lord Balmerino greatly cominended "the excellent law of death-bed which has been the means of preserving many ancient families undestroyit, for otherways sick persons would still be a prey to their wyves, or utheris about them."

In 1696 a statutory change was made in the law. Till then a deed executed in illness was always exposed to challenge however long the grantor survived its execution, unless, of course, he had attended kirk or market. This not being considered satisfactory, the Statute of 1696 enacted that "it shall be a sufficient exception to exclude the reason of death-bed as to all bonds, dispositions, contracts, or other rights that shall be hereafter made and granted by any person after the contracting of sickness that the person lived for the space of threescore days after the making and granting of the said deeds, albeit during that time they did not go to kirk or market." From 1696, therefore, a deed executed by a person not in liege poustie could not be

successfully challenged if he either attended kirk or market unsupported, or lived for sixty days after the date of the deed. One or two cases arose on the statute as to the computation of the sixty days, and it was decided in *Ogilvie v. Mercer*<sup>1</sup> in 1793 that the sixty days meant complete days. In that case, a deed was set aside *ex capite lecti*, where the grantor survived its execution fifty-nine days and three hours—a hard case, doubtless, but the language of the Act had not been satisfied.

Till comparatively recent times the law of death-bed, far from encountering adverse judicial criticism, was frequently the subject of high commendation. Thus, in *Crauford v. Coutts*,<sup>2</sup> Lord Loughborough spoke of it as a part of the ancient law of Scotland, "which I have always looked up to as of great excellence, and I have read cases where it was treated with great respect by Lord Hardwicke." Similarly, in *Mackay v. Davidson*,<sup>3</sup> Lord Brougham referred to the rule as "so wholesome and so judicious." Somewhat later, however, doubts began to be entertained about the expediency of protecting with such extraordinary jealousy the supposed rights of a man's heir, and of the wisdom of maintaining the arbitrary rules as to what constituted evidence of convalescence: indeed, Lord Hatherley, speaking, it is true, in his legislative and not in his judicial capacity, went so far as to say that the law of death-bed was "a jumble of archaic observances, characteristic of a somewhat barbarous age, in order to save judge and jury the trouble of deciding by evidence on a man's state of mind." In the fulness of time the Legislature intervened, and by an Act of 1871,<sup>4</sup> which, after reciting that "it is expedient to abolish all challenges and reductions in Scotland *ex capite lecti*," proceeded to enact that "no deed, instrument, or writing made by any person who shall die after the passing

<sup>1</sup> *Morison's Dictionary*, 3336.

<sup>2</sup> 4 *Paton's Appeal Cases*, at pp. 107—108.

<sup>3</sup> 5 W. & S., at p. 224.

<sup>4</sup> 34 & 35 Vict., c. 81.

of this Act shall be liable to challenge or reduction *ex capite lecti*." The passing away of the old law was not unattended by circumstances partaking of the nature of comedy, and bringing into prominent relief our curiously haphazard Parliamentary methods. It having been decided to abolish the law in question, a Bill was introduced into the House of Commons for this purpose, and at the same time it was proposed to effect certain other amendments in the Scottish law of heritable property. As introduced, the measure consisted of only two clauses, the first abolishing the law of death-bed, and the second abolishing the distinction between "fees of conquest and fees of heritage"; and it bore the title "Fees of Conquest &c. Abolition (Scotland) Bill." To the average Member this conveyed absolutely nothing, so a few of them set out to ascertain what "fees of conquest" might be, and why, whatever they were, it was sought to abolish them. While engaged in this praiseworthy search for information, the part of the Bill relating to fees of conquest was suddenly dropped, the title changed to "A Bill to Abolish Reductions *ex capite lecti* in Scotland"—which was, if possible, more obscure than ever—and before Members knew what was happening, the measure came on in the small hours of the morning and went through. When too late, some Members discovered what had happened, and vigorously protested against the juggling that had taken place with, and the obscurity of, the title, and the way in which the Bill had been rushed through the House. To emphasise his dissatisfaction, one Member actually brought in a Bill to suspend the operation of the hurriedly-passed measure, and on this a long debate took place, in which Mr. Gladstone intervened, when it was generally conceded that something was indeed wrong in our legislative machinery when such an extraordinary thing was permitted to occur, but, of course, nothing was done.

<sup>1</sup> See the debate in *Hansard* for August 17 and 18, 1871.

Thus, as all thought, the spectre of the old law of death-bed was finally laid. But, to the surprise of most people, it was seriously argued in 1890 in *Hay v. Coutts' Trustees*<sup>1</sup> that the Act of 1871 had only abolished the law of death-bed as to "deeds, instruments or writings," and that the old rule still prevailed which prevented a father prejudicially affecting the legitim of his children by delivery of cash on his death-bed. It was unnecessary in the particular case to decide the point, so it remains, as stated in the head-note, an interesting "Query."

J. S. HENDERSON.

<sup>1</sup> 18 Rettie 244.

## VI.—JUDICIAL STATISTICS, ENGLAND AND WALES, 1913.

### PART I.—CRIMINAL STATISTICS.<sup>1</sup>

IT is perhaps a matter of regret that the collection and compilation of the Judicial Statistics for each year is such a lengthy operation that their publication is necessarily postponed for a period of twelve months, by which time many of the incidents which occurred in the year to which they relate, and might afford some clue to fluctuations in the figures, have been forgotten. This is not likely to be the case when the figures for 1914 come to be considered: the decrease in the amount of crime in the country which has been occasioned by the improved conditions of employment, &c., resulting from the outbreak of war, should be striking if the statements which have already been made on the subject, prove to be justified. But it is just because of the exceptional interest which may be expected to attach to the Criminal Statistics published next year that those

<sup>1</sup> *Judicial Statistics, England and Wales, 1913.* Part I.—Criminal Statistics. London: Wyman & Sons.

at present under review may seem comparatively colourless, and even a brief analysis of them may be received with indifference.

It must be admitted at once that the Statistics for 1913 do not contain any very striking features. They are divided as usual into the Comparative Tables, the first five of which cover the last 20 years and are summarised in the sixth; and the Annual Tables, to which, however, a new one has been added (No. XXXII) containing the results of an inquiry regarding the number of deaths from burns caused by the ignition of flannelette and other clothing. This latter Table will be of more interest when it is possible to compare the figures it contains with those which will be available, presumably, next year; but it may perhaps be noted here that out of a total number of 36,801 deaths investigated by coroners' juries, 1,431 were caused by burns, the number of fatal accidents to females being nearly double that in the case of males—948 and 483 respectively. The number of deaths occurring among children under five years of age was 619, the proportion of males and females being more nearly equal; but among persons over five years of age the proportion of females who died from burns is naturally much greater in all cases where clothing was ignited, and it does not appear that flannelette clothing is as dangerous in this respect as are other materials. The remaining Tables compiled from the coroners' returns do not call for particular notice, the figures being nearly the same in most cases as those for the previous year. And the Tables are not, of course, entirely criminal, since the chief object of the coroners' jury is to determine whether death is or is not due to a criminal act, and criminal proceedings only follow in the event of a verdict being found against some person or persons upon whom it may be possible to fix the responsibility.

We may, therefore, turn at once to the Tables dealing with crime in the strict sense, taking first the Comparative Tables of Indictable Offences (Tables A, B and AB). The figures for these offences show an improvement on the previous year, the number of persons tried at Assizes, Quarter Sessions and summarily having decreased from 67,530 to 63,269. These returns are generally agreed to be the most reliable general criterion of the amount of criminality in the country, and they are usually supported by the returns of the number of crimes known to the police (Table D), which have decreased in the total by nearly the same amount (101,997 to 97,933). Practically the whole of this decrease of 4,261 in the number of persons tried for indictable offences comes in the class of offences against property without violence (Class III); and within that class again the fall is almost entirely due to the smaller number of simple larcenies, which have decreased by 4,193 (from 46,923 to 42,730) and stand at a lower figure than in any year since 1906, with the exception of 1911, when they were 42,525. These numbers may still seem somewhat high, but if the increase in population is taken into consideration, the improvement is more marked than would appear at first sight, the proportion of larcenies per 100,000 of the population having decreased from 148·41 to 135·85. Most of the other offences in the same class (*i.e.*, frauds, receiving and larcenies other than minor larcenies) have remained practically stationary, the only ones that show a movement of more than 20 in either direction being larceny by servants (3,707 to 3,996) and embezzlement (1,429 to 1,472) on the one hand; and on the other, larceny of horses and cattle (242 to 206), obtaining money by false pretences (2,275 to 2,149) and larceny from the person (1,685 to 1,517). The latter offence—pocket-picking—has been steadily decreasing, and as its successful accomplishment needs some experience and dexterity, as well as the help of an

accomplice, it is not unjustifiable to infer that the number of more or less habitual criminals who obtain their living in this way has declined and that their place is being taken by the amateur who knows his limitations and confines his attention to the easier exploit of shopbreaking. In the other main classes the fluctuations are small, in proportion to the size of their totals which are also comparatively restricted, since together they only form 14 per cent. of the number of indictable offences. They include most of the more serious crimes, however, and therefore deserve some notice.

Offences against the person (Class I) have advanced again, as they have done every year since 1909, the chief increases being contributed by indecent assaults on females (915 to 996) and procuration (15 to 73): and both the figures for this year and the total for the class (3,326) are higher than they have ever been before. Of those charged with assault, only 521 were actually convicted and sentenced to imprisonment, the remainder being acquitted, discharged on recognizances, or otherwise disposed of: and it is perhaps worth noting that less than half of those sentenced received more than three months. Of the persons charged with procuration, 55 were convicted and sentenced to imprisonment, just one-half of them receiving more than a year; and it will be satisfactory to many persons to find that, in addition, 17 of them were ordered to be flogged.

Offences against property with violence (Class II) are practically stationary, the slight movement being in the right direction. Shopbreaking, the largest item, has again increased beyond the figure for last year, which was itself a record, and now stands at 1,886. It is, however, almost exactly counterbalanced by a fall from 668 to 579 in the number of persons charged with burglary (an offence which, like pocket-picking, is more for the expert than the amateur), and the rest of the reduction in the total is accounted for by a decrease in the charges of housebreaking from 964 to 885.

It is interesting to compare the figures for these three offences with the corresponding police returns. It appears that the number of reported cases of shopbreaking (4,260) and of burglary (1,501) have diminished slightly, the reduction being 263 for the two taken together; and that the reports of housebreaking (5,195) have grown by 274. It seems, therefore, that the increase in the number of persons charged with shopbreaking has occurred in spite of a diminution in the number of cases reported, while with housebreaking it is exactly the reverse. To the lay mind the three offences do not run very different from one another, burglary being housebreaking by night and shopbreaking only distinguishable by the type of building entered. Too much stress must, therefore, not be laid on the variations in the figures, which in the case of the two former are not very marked. But as regards shopbreaking, the sudden rise in the cases reported, which occurred in 1908, appears to have been definitely checked, the numbers having decreased continuously since that date, and it is permissible to conclude that this is due to increased vigilance on the part of the police, who have succeeded in bringing a larger proportion of offenders of this class to book.

Class IV, malicious injuries to property, and Class V, offences against the currency, have decreased a little, both as regards the number of cases reported and of the persons tried; and the figures for Class VI, containing the remaining indictable offences, not previously included, show a small rise. None of these figures, however, call for special comment, and we may therefore pass on to consider the non-indictable offences contained in Table C.

The total of these offences shows an increase over that of 1912 and represents an addition of 17,151, the totals for the two years being 663,139 and 680,290. The increase, however, is not so great as between 1911 and 1912, when it was 27,994. The advance shown in the latest total is

chiefly due to offences against the Intoxicating Liquor, Highways, and Education Acts, against Police Regulations, and against the provisions of the law as to Sunday Trading and Gaming. Of these offences, drunkenness, both simple and with aggravations, forms by far the largest item, and the number of persons tried has risen from nearly 198,000 to over 204,000. On the other hand, there is a decrease in the number of persons charged with sleeping out, from 8,338 to 7,131, the latter being the lowest figure reached for this offence since 1900. Most of these offences, though technically criminal, may be described as non-criminal in character, and the figures for strictly criminal offences may therefore be regarded as more or less stationary.

We must now return to the indictable offences and examine the number of persons who came before the various Courts, the result of the proceedings and the nature of the sentence passed.

The total number for trial at Assizes and Quarter Sessions was 12,509 (4,055 at Assizes and 8,454 at Quarter Sessions), and of the total 1,305 were women. There were also two cases for trial in the King's Bench Division of the High Court. In 227 cases the defendants were not actually tried, 194 being discharged because the Grand Jury did not find a true bill, and 4 because the prosecution was not proceeded with; while 29 were found insane on arraignment and ordered to be detained during His Majesty's pleasure. It may be noted, in passing, that 8 of the latter were charged with murder or attempted murder, 2 with arson, and 2 with attempted suicide. Of the persons actually tried, 2,089 were acquitted, 10,165 were convicted and sentenced, and in 30 cases a special verdict of "guilty but insane" was returned by the jury under the Trial of Lunatics Act 1883: 22 of the latter were charged with murder or attempted murder.

As regards the sentences imposed, 6,900 received varying terms of imprisonment and 829 penal servitude, the most usual terms being 3 years (534 cases) and 5 years (162 cases); only 17 were awarded sentences of 10 years or more. In addition to those convicted on indictment, 614 persons came before the Courts of Quarter Sessions for sentence, having been convicted of being incorrigible rogues by Courts of Summary Jurisdiction, under sect. 10 of the Vagrancy Act 1824; 579 of them were sentenced to imprisonment, 24 were discharged on recognizances with or without the making of a probation order, 10 were discharged absolutely, the period they had been in prison awaiting sentence being considered sufficient, and one was certified insane and sent to an asylum.

Turning to Table XLII for a moment, it will be seen that 67 of the persons sentenced to penal servitude were also convicted of being habitual criminals and received terms of preventive detention in addition; but only 15 of them received more than the minimum sentences under the Prevention of Crime Act 1908, viz., 3 years' penal servitude to be followed by 5 years' preventive detention. This is no doubt due to the fact that a sentence nominally of 8 years seems a heavy one, even for a prisoner who has been found by a jury to be of persistently criminal habits, and there is a natural tendency to overlook the considerations that only three-quarters of the term of penal servitude need be completed if the prisoner is well-behaved and earns full remission, and that the Home Secretary may at any time discharge him on licence while undergoing detention, if satisfied that there is a reasonable probability that he will abstain from crime. The Act of 1908 was designed to afford the public protection, if necessary for a prolonged period, from men who have adopted crime as their mode of life, but it also makes it possible for the criminal who shows an intention to reform to obtain his

release on licence at a comparatively early date. His chances of obtaining his release are the same, whether his sentence of detention is 10 years or 5, provided he shows himself worthy of lenient treatment; but if he does not show any intention of giving up his criminal habits, it seems clearly desirable that he should be prevented from preying upon the public for as long a period as the law allows. Up to the end of 1913 licences had been granted only to 7 habitual criminals (1 in 1912 and 6 in 1913), and two of these licences were subsequently revoked. These figures are too small to be of any real assistance in determining the period of detention which is required by the average habitual criminal to reform, but until fuller data are available it would seem reasonable to regulate the sentences mainly from a preventive point of view, since the prospects of criminals who show a genuine desire to make a fresh start on the paths of honesty would not be in any way prejudiced thereby.

To resume the examination of the proceedings in the various Courts, the number of persons convicted on indictment who applied to the Court of Criminal Appeal for leave to appeal against conviction or sentence or both was 608, but leave was granted only in 111 cases. There were also 46 other appeals for hearing, of which 33 were on grounds involving questions of law, 7 with certificate of the judge at trial, and 6 against sentences of preventive detention. In only 79 cases was the original conviction or sentence quashed, and only 31 of the appellants were completely successful and secured their release. In addition, one case was referred to the Court by the Home Secretary on the consideration of a petition from the prisoner for the exercise of the Prerogative of Mercy; and two appeals went to the House of Lords on the fiat of the Attorney-General. In one of the latter cases the conviction was quashed, but the other two were affirmed.

The number of persons tried summarily was 731,048, of whom 680,290 were charged with non-indictable offences. Of the remaining 50,000 odd cases of indictable offences, the charge was proved in just over 45,700, but only 27,120 of the offenders were actually convicted, orders being made in the other cases for their dismissal, discharge on recognizances, or on probation, or for committal to an Industrial School, or to the custody of relatives. Just over half the persons convicted were sentenced to imprisonment in the first instance, 9,683 were ordered to pay a fine, 1,043 were committed to Reformatory Schools, and 2,114 were ordered to be whipped. Of the persons charged with non-indictable offences, 542,827 were convicted, a fine being imposed in no less than 492,871 cases, while the charge was proved in 67,223 cases without the Court proceeding to a conviction. The total number of persons fined by Courts of Summary Jurisdiction (502,551) is striking, and a reference to Table XXXV shows that 75,136 went to prison in default of payment: they formed more than half the number of convicted prisoners received in the year, and nearly doubled the total prison population. The proportion of fines paid was greater than in the previous year, but the number unpaid still seems deplorably large and must represent a heavy loss to public funds, not only in the shape of unrecovered money, but also by reason of the additional expenditure involved in keeping the defaulters in custody. No doubt many of them were really unable to find the money, but it is probable that a large proportion preferred a few days' imprisonment at the public expense, and deliberately refused to pay though able to do so. The latter class, however, can now be dealt with under sect. 4 of the Criminal Justice Administration Act 1914, which provides *inter alia* that, "where a person has been adjudged to pay a sum by a conviction of a Court of Summary Jurisdiction . . . . the Court may order him to be searched and any

"money found on him on apprehension, or when so searched, or which may be found on him when taken to prison in default of payment . . . . may, unless the Court otherwise directs, be applied towards the payment of the sum so adjudged to be paid." In cases of arrest, it has already been the practice to search prisoners before they are brought into Court, and a report is made to the Court of the property, including money, found on them: but money so found could not be applied to payment of a fine against the man's will. Under the new powers given by this section a defendant may be compelled to pay if he has money in his pocket to do so before he leaves the Court, and it seems possible that this will lead not only to the recovery of a larger proportion of fines, but also to a saving of time and labour involved in his committal to prison. Besides the strictly criminal cases dealt with by Courts of Summary Jurisdiction, 15,853 orders were made for sureties to keep the peace or to be of good behaviour, more than 6,900 for the maintenance of illegitimate children, and nearly 8,000 for the maintenance of wives under the Summary Jurisdiction (Married Women) Act 1895. There was also a large number of orders made for the possession of small tenements and under the Poor Law and Public Health Acts; but these are mainly interesting as an illustration of the amount and variety of the work which is performed by these Courts.

The total number of juvenile offenders was 38,341, of whom 20,725 were "children" (*i.e.*, under 14) and 17,616 "young persons" (*i.e.*, between the ages of 14 and 16): most of these were dealt with by special Children's Courts, but 756 children and 2,913 young persons came before ordinary Courts of Summary Jurisdiction, either because they were charged jointly with adults or because they were supposed to be over 16 years of age. Only 15,214 of the persons dealt with by Juvenile Courts were convicted, and orders without

conviction were made against 17,648. These figures represent 41 per cent. and 47 per cent. of the total respectively, and it is interesting to note that in the case of persons tried by the ordinary Courts of Summary Jurisdiction, the corresponding ratios were 80 per cent. and 10 per cent. The number of persons under 16 who were dealt with without conviction was very nearly the same as in 1912, and almost exactly a quarter of them (4,465) were placed under the supervision of probation officers. Probation orders were also made in respect of 6,592 other persons against whom offences were proved, making a total of 11,057 orders for the year.

The figures relating to Extradition and Fugitive Offenders are, as usual, small. There were 66 applications received from foreign Governments for the surrender of criminals, one less than in the previous year; but the number of applications made by the British Government was exactly double (18). Under the Fugitive Offenders Act, seven persons were brought to this country and six fugitives from the Colonies were sent back for trial.

The number of prosecutions undertaken by the Director of Public Prosecutions was 486, a decrease of 76 from the previous year; and the number of defendants was 623 as against 727 in 1912: 552 of these persons were charged with indictable offences, and 388 convicted, while 71 were charged with non-indictable offences and 58 convicted.

The Police Returns have already been referred to in dealing with the figures relating to persons tried for indictable offences; and though there is no need to examine them in detail, a few of the main totals may be noted. As previously stated, the number of indictable offences which came to the notice of the Police was 97,933, and for these 60,633 persons were arrested and 8,632 were dealt with by summons, making a grand total of 69,265 persons prosecuted. The result of these prosecutions was that of the total 15·5 per cent.

were discharged; just over 39 per cent. were convicted and sentenced; in 26·8 per cent. of the cases, the charge was proved and an order made without a conviction being recorded; and in the remainder, excluding a very small number otherwise disposed of, the defendants were committed for trial at Assizes or Quarter Sessions.

We may now pass on to the Penal Statistics, which include the returns of persons received into local prisons, Borstal Institutions, and Reformatory and Industrial Schools. It has already been noted that the prison population was nearly doubled by the number of persons received in default of payment of fines. Besides these, there were 28 persons under sentence of death and 815 with sentences of penal servitude, the first portion of which is served in a local prison, the period varying in most cases from one to three months. There were also 16,600 persons received on remand or committal for trial who were afterwards discharged or acquitted. Rather more than 90,000 of those sentenced to imprisonment were ordered hard labour, and 47,000 odd were imprisoned without hard labour. The majority of the latter were placed in the third division, generally, no doubt, because there were no special circumstances which would justify their being given preferential treatment: 31 were placed in the first division and 1,609 in the second, but the latter figure, though an increase of 81 on the number so treated last year, seems a small proportion of the 45,000 odd who were not identified as having been previously convicted. The figures for Borstal Institutions are practically the same as in 1912, the number of admissions being 471 males and 48 females as against 481 and 50 in the previous year. The number of youthful offenders received into Reformatory Schools was 1,224—a decrease of 776—and the number of admissions to Industrial Schools had also decreased, though not to the same extent, and a slightly higher proportion of those admitted were

charged with crime. The total number of criminal lunatics confined in asylums at the end of the year was 1,164, of whom 984 were in State asylums and the remainder in county and borough asylums. Local asylums are required by Statute to receive criminal lunatics, but it appears that they have now been largely relieved from the care of such patients, doubtless through the increased accommodation available in the new State Asylum at Rampton. This also accounts for the closing of Parkhurst as an asylum during the year; only one person was received there as a criminal lunatic during 1913, and none were detained as such at the end of the year.

The only other Table that requires notice is that dealing with the Pardon of Mercy, which was exercised in 245 cases. Of the 28 persons sentenced to death 12 were reprieved and the sentence was commuted to penal servitude for life; 6 sentences of penal servitude and imprisonment were commuted to less severe punishments; remission of sentence was allowed in 185 other cases and 6 free pardons were granted; in 91 cases remission was granted on medical grounds, and only 7 persons were released on grounds affecting the original conviction.

---

## PART II.—CIVIL STATISTICS.<sup>1</sup>

Once more these Statistics have been edited by Sir John Macdonell, King's Remembrancer, and Senior Master of the Supreme Court. With certain exceptions, the Annual Tables have substantially maintained the same form as in the Returns for 1912. Table L has been simplified, and Table LXX omitted owing to the temporary reduction in the staff of the Statistical Branch of the Home Office.

<sup>1</sup> *Judicial Statistics, England and Wales, 1913. Part II.—Civil Judicial Statistics.* London: Wyman & Sons. 1915.

Table LXXXVII, relating to the proceedings before the Public Trustee, is an entirely new departure.

The gradual diminution of legal business which has characterised the Returns for the last decade has been maintained. In the proceedings commenced in all Courts the decrease compared with 1912 is but slight—1,355,152 for 1913, as against 1,368,423 for 1912. Compared with 1904, there is a decline of 10·78 per cent. In proceedings actually heard and determined, there is, however, a slight increase over those of 1912—429,718 for 1913, as against 426,867 for 1912. This represents a decline of 13·60 per cent. from the figures for 1904. With an increase in the population, a decline in the volume of business compared with the population is a necessary sequence. Proceedings commenced were 3,670·57 per 100,000 of population in 1913, as against 3,745·03 in 1912. Proceedings heard and determined were 1,163·94 per 100,000 of population in 1913, as against 1,168·23 in 1912.

For this general decline the County Courts, where the great bulk of the business of the country is conducted, are once more responsible. To the cause of this decline we shall refer later. Proceedings in those Courts touched the highest point in 1904, after an almost continuous rise since 1894. Since 1904, with the exception of three years, 1908, 1909, and 1910, there has been a corresponding decline. The diminution commenced since 1910 has been continued in the succeeding years.

Turning to the figures relating to the particular Courts, we find a substantial increase in the Appellate Courts in the number of proceedings commenced compared with those for the preceding year. They number 1,515, as against 1,377 for 1912. On the other hand, in the number of appeals and actions, &c., heard and determined, there was an almost corresponding decrease—1,090, as against 1,110 for 1912.

Upon analysis of these figures, the Judicial Committee of the Privy Council and the Court of Appeal are found to share responsibility for the increase in proceedings commenced. In the case of the former, appeals entered increased from 100 to 141, and in the case of the latter, final appeals increased from 587 to 637, and interlocutory appeals from 188 to 228. Of the appeals to the Judicial Committee, 65 are from India, 73 from Colonial Courts, one from China, and two from Jersey. Whilst the increase from India is insignificant, that from Colonial Courts is almost doubled. From Canada the increase is very marked. From the Dominion Supreme Court the increase is from 6 to 15, whilst that from the Provincial Courts is only little more than maintained, being raised from 21 to 22. By Order in Council of 1914, appeals from Provincial Courts direct to the King in Council have been permitted as an alternative to an appeal to a Dominion Supreme Court. The increase is chiefly due to this cause, and indicates the estimation in which the Judicial Committee is held in the Dominions. There is also a big jump in the appeals from the High Court of the Commonwealth of Australia, from one to eight. As the decisions in the Supreme Courts of the Dominions are subject to certain statutory reservations, this increase is somewhat remarkable. In the applications for special leave to appeal, an increase is also observable, but of 64 petitions for special leave, no fewer than 36 were granted. One appeal, that from the Seychelles, which attracted considerable public attention, was in a criminal case, and resulted in the quashing of the judgment and sentence. It was found by the Committee that justice had gravely and injuriously miscarried. But for the large increase in appeals, their Lordships would have somewhat lightened their list. With 132 appeals over from 1912, bringing up the total to be heard to 273, they succeeded in disposing of 107, leaving 166 pending at the end of the year. This is not a very

satisfactory result. The only remedy is, of course, more frequent sittings. Whether this is possible is for their Lordships to consider. As it was, the number of days of sitting increased from 101 in 1912 to 124 in 1913. The annual average of appeals to the Judicial Committee for the period 1909-13 is 120·6, and for the period 1904-08, 89·6; whilst that for petitions to the House of Lords is 89·8 and 81·2 for the corresponding periods respectively. The position to-day in the House of Lords is not far different from that in 1904, when petitions numbered 73 compared with 71 in 1913. But the relative position of the two tribunals in the amount of business brought before them has been reversed. At one time, in 1907, 1908 and 1909, business in the House of Lords very considerably exceeded that in the Judicial Committee. In 1913, however, it is practically half that of the latter.

Had it not been for 53 petitions pending at the commencement of the year, the House of Lords would nearly have cleared their list. Of the total to be heard, they disposed of 87, leaving only 37 pending as against 53. It must be noticed, however, that no less than twenty petitions fewer were presented during 1913. Here, too, the number of days when the House sat for judicial business increased from 86 days in 1912 to 115 in 1913. Of interlocutory petitions there was an increase from 88 to 114. Petitions to sue or defend in *forma pauperis* declined from 18 to 12, and in only two cases was the pauper successful. In no less than 10 he was found to have no *prima facie* case. It is again observable that the number of successful appeals to the Judicial Committee is far greater than those to the House of Lords. The former are considerably more than half of the number heard and determined, while the latter are considerably less than half. Whether this indicates a higher degree of legal knowledge in the members of the Appeal Courts in the United Kingdom than in the Supreme

Courts of India and the Dominions may be questioned. With appeals from Provincial Courts of the Dominions in increasing numbers, the cases are not really comparable. With an increased attendance of the House, and a considerable diminution of business, it is still satisfactory to note that the improvement in the time-table, which has been such a marked feature during the last decade, has not only been maintained, but intensified. In 1902 the majority of appeals took from one to two years, from the date of the order of the Court below to the final adjudication in the House of Lords. Of the 64 petitions heard in 1913, 61 were taken within three months after setting down, two within six months, and only one more than one year. The Committee of Privileges have made no progress, five peerage claims being still outstanding: one, the Earldom of Airth, having been presented in 1906 and the remainder in 1911.

Petitions for personal Acts presented in 1913 all received the Royal Assent the same year. Four were for divorce, two related to family heirlooms, two to trust estates, and one to Ascot. Altogether a picturesque and motley collection.

As already mentioned, appeals entered in the Court of Appeal increased from 775 to 805. With 228 left over from 1912, 1,093 were standing for hearing, of which 741 were disposed of, leaving 352 pending at the end of the year. In view of the fact that the Court sat nine days more—418 days as against 409 in 1912—this result cannot be described as satisfactory. The quinquennial average of arrears is only 193·8. In 1912 this was only 161·6. If this increase continues, Appeal Court III will have to be formed more frequently. Of the 850 appeals from judgments and final orders pending or set down during the year, 126 were withdrawn or arranged; 231 affirmed; 15 varied; 93 reversed; 16 new trials ordered; 26 struck out.

and 14 otherwise disposed of, leaving arrears of 329. Of these appeals, 127 were from the Chancery Division, and 194 from King's Bench Division. In the former Division 58 were affirmed and 32 varied or reversed. There were no new trials. In the latter, 71 were affirmed, 36 varied or reversed, and 10 new trials were ordered. In 1912 the comparison was largely in favour of the Chancery Division. This year the difference in the results are not so striking, though still favourable to the Chancery Division. In appeals from interlocutory orders, the advantage lies wholly with the Chancery Division. Whilst 33 orders were affirmed, only 9 were varied or reversed; whilst in the King's Bench Division, 52 were varied or reversed, as against 80 affirmed.

Turning to the Statistics of the Supreme Court, we find that the continuous and persistent decline in the business of the Court during the last ten years has been maintained. Once more we have to record a decrease in proceedings begun from 5,566 in 1912, and from 6,779 in 1904, to 5,344 in 1913. Actions set down during the year numbered 501, which, with 190 left over from the preceding year, made 691 to be dealt with. Of this number 412 were heard, 135 otherwise disposed of, leaving 144 pending at the end of the year. The position therefore was more favourable than in 1912, and particularly so, inasmuch as the Courts sat fewer days—1,088, as against 1,140 in 1912. The arrears are now less than they have been since 1907 and constitute almost the exact average for the quinquennial, 1904-08, viz., 1438. In every department of this Division the figures disclose a loss of business. "Never before," wrote Sir John Macdonell last year, "was the volume of business in this Division so small as in 1912." This record has now been broken.

In the King's Bench Division, although there has been a decline in civil business in some departments, it has not been so marked as in the Chancery Division nor so severe.

The decrease in the issue of writs has only been slight, 60,511 as against 60,789 in 1912. In 1904 the number was 72,816. The decrease in summonses before Masters and District Registrars was somewhat larger, 31,398 as against 32,791 in 1912. On the other hand, the figures for the proceedings in Court do not vary much from those for 1904 and compare favourably with the average for the quinquennial period 1904-08. Actions entered for trial in London and Middlesex, on circuit and before the Official Referees, numbered 3,251, compared with 3,644 in 1912 and 3,553 in 1904. Of these 2,359, as against 2,107 in 1912 and 2,345 in 1904, were disposed of. The amount recovered in all actions, except actions for possession, costs, &c., was £668,722, an increase upon 1912 of no less than £149,283. The average for the quinquennial period 1908-13 is £622,152, and for that of 1904-08 is £741,333. The average amount for actions for 1913 is £459, and for the quinquennial period 1908-13 £458, compared with £560 for that of 1904-08. The latter average, however, is somewhat misleading, as it is due to one year, 1907, when the amount recovered was £1,571,374, nearly three times that of any other year in the period. It has been alleged that damages awarded by juries have tended lately to increase. Omitting 1907 and 1909, when the amount was £755,940, 1913 is the best year since 1904. This increase is said to be particularly observable in actions for libel and slander, which numbered no less than 383, or over 9 per cent., in 1913. In libel the average amount recovered per action was £235 compared with £221 for 1912, and with the annual average of £285 for the quinquennial period 1908-13. The annual average for the quinquennial period 1904-08 was £489, but here again the average is disturbed by the exceptional year 1907, when the average amount per action was £1,392. The position in slander actions is similar. The average

amount recovered per action is £85 compared with £64 in 1912, and with the annual average of £55 for the quinquennial period 1908-13. The annual average for the quinquennial period 1904-08 was £70. The comparatively insignificant amounts recovered in slander actions, compared with that recovered in libel, will be observed, showing the more serious view which juries take of the written word. Of the total number of actions tried on circuit, a heavier percentage—19 per cent.—were for libel and slander. In libel actions the average amount recovered per action on circuit was only £162 compared with £289 in London and Middlesex. In slander actions the figure is £71 compared with £117. If we take the five years 1909-13, the amount recovered for slander averages £82 per case, whilst on circuit it averages only £44. It is therefore quite clear that provincial juries view both these offences more leniently than London and Middlesex juries. On circuit, no verdict for £500 and over for slander was given in 1913, and, with the exception of 1912, none since 1904.

The amount, however, recovered in the King's Bench Division by trial by a judge or by a judge and jury is comparatively small. Out of a total of £4,400,402, only £353,141 were recovered in the former way, while the amounts recovered by default of appearance and under Order XIV were £2,231,021 and £1,368,063 respectively. The average amount per action recovered by default of appearance was about £127, and by Order XIV about £266. There is practically no change in the proportion of actions tried by a judge and jury and of those tried by a judge without a jury. In each case the figures are well above the annual average for the quinquennial period 1909-13. It is satisfactory to note that the arrears are nearly half those for 1912, 470 compared with 864. The annual average for the quinquennial period 1909-13 is

7322. Causes set down for trial under Order XIV show an increase over 1912, 81,234 compared with 64,843, but a decrease, compared with the annual average for the quinquennial period 1909-13, of 96,178. Actions set down in the Commercial List, however, though less by 11,266 than those in 1912, are well above the annual average for the quinquennial period 1909-13, viz., 56,068, as against 49,058.

The increase of business on assize recorded last year has not been maintained. In fact, there has been a considerable decline. Causes entered for trial numbered 829, as against 952 in 1912. The annual average for the quinquennial period 1909-13 is 909·0. Of actions tried in Court or otherwise disposed, the decline is also noticeable, being 594, compared with 683 in 1912. The annual average for the quinquennial period 1909-13 is 660·6. This decline is again manifest in the amount recovered, viz., £78,622, compared with £120,246 in 1912, and with the annual average for the quinquennial period 1909-13 of £105,968. The Northern circuit continues to hold the record for business. Causes tried and determined numbered 203. The North-Eastern is second with 100, and the Midland third with 96. This relative position is also the same in the amounts recovered, viz., £27,871 by the Northern, £10,773 by the North-Eastern, and £9,556 by the Midland.

We may again refer to the recommendation of the Royal Commission on Delay in the King's Bench Division, "that the judge of the circuit should be empowered to alter the venue of any cause entered for trial to the last place on circuit, unless at least four causes have been entered at the place originally fixed for its trial, or unless, in his opinion and with the consent of the parties, any particular cause involves boundary questions, necessitates a view, or requires a specially large number of local witnesses, and would therefore be better tried on the spot." Out of the

304 assizes held during 1913, at no fewer than 65—the same number as in 1912—the number of causes for trial was less than four. At 25 assizes there was only one solitary case apiece.

Successful plaintiffs in the King's Bench Division numbered 25,086, a little under the quinquennial average; whilst successful defendants were 516, a little above the quinquennial average. The amount of fees received by the Division was £125,014. This, it is true, is £6,584 less than in 1912, but well above the annual average of £103,389 for the quinquennial period 1909-13. On the whole, there is no cause for pessimism with this analysis of business in the Division.

In this dry record it is refreshing to find that the trial of the Pyx, by a jury of goldsmiths, was presided over by the King's Remembrancer at Goldsmiths' Hall, and the verdict duly recorded.

Turning to the Probate, Divorce and Admiralty Division, business in the Divorce Court is still on the up grade. Suits commenced were 1,267 compared with 1,159 in the preceding year, and are well above the annual average of 1,078·4 for the quinquennial period 1909-13. Reviewing proceedings commenced in this Court for the last decade and comparing them with the growth of population, the figures show a steady increase, particularly during the last three years. The increase in the case of husbands' petitions for divorce since 1904 is 22·32 per cent. and in the case of wives, 65·44 per cent. The increase of suits for restitution of conjugal rights is very marked, being no less than 285·71 per cent. over 1904. As a preliminary to a petition for divorce, this method of obtaining relief is evidently becoming more popular. Whilst from some points of view we may deplore this evidence of an increasing number of unsuitable marriages, on the other hand we may rejoice that so many have the courage to determine an intolerable

situation. As usual, verdicts or judgments for the respondent were few—36 as against 1,040 for the petitioner. Judicial separations are still out of favour and just touch the annual average of 22·6 for the quinquennial period 1909–13. Trial by jury is not viewed with much favour by suitors in this Court. The number was 72 only, rather below the annual average of 75·6 for the quinquennial period 1908–13 and of 82·8 for the quinquennial period 1904–08, whilst petitions tried without a jury amounted to 1,043.

The large number of matrimonial suits in which the duration of the marriage was between ten years and twenty is once more a curious feature, and is some evidence of "the dangerous age" theory in the case of women, discussed in some recent novels. These number 481, whilst there were 146 suits in which the duration of the marriage was from twenty years upwards. The large proportion—more than a third—of these unhappy marriages which are childless is once more a striking feature. Other comparisons which we were enabled to make last year cannot be repeated, since the materials on which they were based have been omitted from Table L, as mentioned above.

Admiralty business also, on the whole, shows a tendency to increase. Actions commenced numbered 544, which is below the annual average of 562·8 for the quinquennial period 1908–13, but above that of 532·4 for the preceding five years. The majority of these cases were claims for damages caused by collision, and numbered 366. This constitutes a considerable increase over the annual average of 341·8 for the quinquennial period 1909–13 and that of 327·8 for the preceding five years. In three-fourths of the cases judgment was given by consent, and the figures do not disclose which party was successful; probably they were, in effect, judgments for plaintiffs. That business was on a larger scale is shown by the total amount of accounts reported due in matters submitted to the Registrars, viz.,

£438,310, compared with the annual average of £404,636 for the quinquennial period 1909-13 and that of £292,772 for the preceding five years. The total amount of costs brought in for taxation, viz., £57,835, was not quite so large as in 1912, but was above the annual average of the quinquennial period 1908-13 by £5,822, and above that of the preceding five years by £3,238.

In the Probate Court, the reduction which took place in 1912 has in most departments been effaced, and business tends, on the whole, to increase. Juries were more favoured by suitors in this Court than elsewhere; whilst 48 were tried before a jury, 82 were taken by a judge alone.

Proceedings in Lunacy, which showed a marked increase in 1912, have fallen, although they were still well above the annual average for the quinquennial period 1909-13.

Of the proceedings before the Railway and Canal Commissioners, which totalled 129, it is interesting to note that 25 applications were presented for alleged undue preference; 27 for alleged unreasonable increase of rates; and 34 for other disputes as to rates and charges. Of the total, only 20 cases were disposed of, leaving 109 pending at the end of the year. In view of the importance of a speedy decision in questions so vital to traders, this state of affairs is most unsatisfactory. As the Court only sat on 29 days, it could not be expected to make greater headway with the list. Two of the Commissioners are permanent judges of the Court, whilst the third judge who makes up the Court is one of the judges of the superior Courts of England, Scotland and Ireland. It rests with the permanent judges to explain the unwieldy state of the list.

In all the inferior Courts other than the County Courts, Sir John Macdonell reports a decline in proceedings begun and heard and determined. This diminution of business we recorded last year. In the Mayor's Court, London, the proceedings fell from 9,180 in 1912 to 8,646 in 1913. The

popularity of this Court is probably not much diminished; it is only suffering like the rest from a general falling off in litigation. One feature to which Sir John Macdonell draws special attention is worthy of note. Out of 259 actions tried or otherwise disposed of in this Court, no fewer than 250 were taken before a jury. Sir John suggests that the probable reason is a belief that a jury suitable for the trial of mercantile cases is generally available. This may afford a useful hint to the authorities who desire to attract business to the Courts generally.

The figures as to jurors summoned by the sheriffs to serve at Assizes, Quarter Sessions, High Court of Justice, Sheriffs' Courts, &c., are very large—73,149 in all, of whom 15,992 were grand jurors. Special jurors were about one-third of the common jurors, 14,836 as against 42,321. To the above number must be added 11,192 grand jurors and 18,040 petty jurors summoned by the clerks of the peace for the boroughs, making a grand total of no fewer than 102,381.

Sheriffs' Courts, once of supreme importance, are now, owing to the wider powers conferred on County Courts, in a state of comparative atrophy. Only 113 writs of enquiry were lodged, and the Courts only sat for 91 days, of which 29 were in respect of the County of London Sheriff's Court.

The large and wholesome reduction in Bankruptcy proceedings recorded last year has not been repeated in 1913. There was, however, a slight decrease of business in almost every department, the figures, with few exceptions, being well below the annual average for the quinquennial period 1909-13. Bankruptcy notices increased from 5,794 in 1912 to 5,810, whilst petitions filed fell from 5,011 to 4,843. The net total of receiving orders also fell from 3,546 to 3,326. The number of petitions and receiving orders is the smallest since 1884. Of petitions presented for the winding-up of companies, the number was slightly increased from 297 to 315. The net

number of deeds of arrangement for 1913 show a considerable drop from 2,770 to 2,411. The total estimated liabilities of debtors were slightly higher, £5,231,227, as against estimated assets of £1,868,044, creditors thus suffering to the extent of £3,343,183, rather more than in 1912, but well under the average loss during the last five years.

We have already referred to the decline in the business of the County Courts. This decline, which became apparent in 1910, still continues. The proceedings commenced in 1913 have again fallen, from 1,267,507 to 1,257,011, the smallest recorded since 1901. When compared with an increasing population, this decline is the more marked. In plaints entered for amounts not exceeding £20 the number fell from 1,214,320 to 1,207,005. In those between £20 and £50 the number increased from 13,412 to 13,715, and in those between £50 and £100 from 2,558 to 2,744. Plaints, however, in which more than £100 was involved fell from 515 to 460. Remitted actions from the High Court declined from 1,556 to 1,469. Of the total number of actions disposed of, 389,581 were determined without a hearing, 31,087 were heard before a judge alone, and 776 only before a judge and jury, whilst 381,771 were determined before a registrar. The number of actions struck out or otherwise disposed of was 426,743, thus exceeding the number of actions determined on hearing. Actions pending at the end of the year have decreased rather more than in 1912, being 93,611 as against 98,180. This again indicates that, in spite of the general decrease in the business of the Courts, the judges are overworked.

The endeavour made by Sir John Macdonell, in his Introduction last year, to ascertain the causes of the general decrease in the business of the County Courts, has been repeated in the present Introduction. The three chief

causes suggested last year were (1) Decline in the credit system; (2) Fewer committal orders; and (3) State of trade. The views of some registrars upon the changes in the volume of litigation are no doubt illuminating, but are too conflicting to build any general propositions upon them. The increase of plaints in certain towns or districts, all are agreed, were due to the coal strike of 1912, which led to many debts being incurred by the work-people affected. It produced a crop of debts which tradesmen sought to recover in 1913. On the other hand, the decrease in the number of plaints in Walsall is said to have been attributable to the prolonged strike in the iron trade in 1913. But, on the analogy of the coal, the decrease in 1913 will be followed by a corresponding increase in 1914. Sir John seems to have missed this point. Prosperity in trade is given as a cause both for increase and decrease. The Registrar of Glossop writes that "when the people are all working and in receipt of regular wages, creditors see a better chance of getting their money, and enter more cases in Court," whilst the Registrar of Southport explains that the chief reason for a decrease "was undoubtedly the commercial prosperity of the district. There was very little unemployment, and the wages were generally good." The considerable decrease in Rochester and Frome is ascribed to the depression of the principal trade in the district. Thus, in some districts a good state of trade is said to increase plaints and in others to diminish them. The continued disinclination of judges to make committal orders tends, in the opinion of most people, to reduce the number of plaints. "Creditors," writes one registrar, "naturally decline to enter plaints against the class of debtors who will not pay until they are made to, knowing that in very many cases they would only get a barren judgment."

One of the reasons assigned for the decrease is curious and worth noting. "The custom of purchasing goods on the

"hire system only," writes the Registrar of Colne, "is greatly on the increase amongst the working-class population of this district, which is largely an industrial one. Here the plaintiff, in the absence of any system of compulsory registration of such agreements, comes into Court in the full belief that the well-furnished cottage of the defendant will, under execution levied, be available to satisfy the judgment presently obtained; but great is his surprise and disappointing his experience to find that, unless all instalments under the hiring agreements are discharged, the property in such furniture is still the hirer's, who thus remains largely the master of the situation." There appears to be something wrong with the last paragraph. We do not understand why, if all the instalments are not paid, the property in the goods is still in the hirer. Hiring agreements usually provide that, until the last instalment is paid, the property remains in the owner.

On the whole, we are inclined to think that the chief cause of the decline is the increase of the cash system followed in the great emporia of limited companies and in the stores of co-operative societies.

Accounts for the receipts and expenditure of the Courts are made up to March 31, 1914. Receipts have slightly increased and expenditure has considerably fallen. The net loss is £163,534, compared with £208,877 in 1913, and with the annual average of £190,415 during the last five years. We ventured to criticise adversely last year the large item of £96,316 for rent, travelling, scrivenery, stationery, &c., suggesting that probably waste in stationery was responsible. This item is now reduced to £68,595, a very considerable saving.

In the Introduction Sir John Macdonell has included several statements showing the effect of the war during the Long Vacation of 1914, and Comparative Tables giving the figures for the years 1913 and 1914. Naturally there was an enormous drop in every department. The number

of writs issued on November 5 was 519, compared with 142 in the preceding year, showing the immediate result of the expiration of the Moratorium on November 4th. These figures, however interesting, have no bearing on the Statistics for 1913, and we are rather surprised to find them thrown in with such apparent irrelevancy.

## VII.—CURRENT NOTES ON INTERNATIONAL LAW.

### Non-combatants at Sea.

THE position of the non-combatant at sea has never been made clear by convention. That fact is perhaps hardly to be regretted, for we have lately had more than sufficient evidence to show the extremely inefficacious nature of the Hague agreements, qualified as they are at every turn by considerations of military "necessity." Long before the conclusion of the Hague agreements, the indiscriminate slaughter of non-combatants on land had been forbidden by the universal consensus of nations, just like the killing of prisoners. The Conventions only affirmed and affected to extend this rule of modern humanity. But we cannot doubt that it applies to warfare at sea; and that the killing of non-combatant traders is as illegal as it is atrocious. No example of its occurrence can be pointed to prior to the Russo-Japanese War of 1904-5; and although many instances exist of enemy merchantmen (as distinct from neutral merchantmen) being burnt or sunk, we never find the exigencies of naval warfare being invoked—at any rate, since the days when every ship was a fighter—to justify the burning or sinking of them with their crews on board. Neither a Semmes nor a Grau, who were chivalrous sailors, did or dreamt of it—difficult as their situation was. That the maximum of damage cannot be done by a submarine

without recourse to such brutality may be a defect in the submarine, but it does not absolve it from observing the laws of war. The test of the admissibility of a warlike act is: Does it conform to recent precedent? Judged by this test, the German violence stands condemned.

---

### Retaliation in Trade.

What can hardly be regarded as anything but an unfortunate crescendo of retaliation has seemingly ended in a claim to put the world back into the fifteenth century, and to deny all nations liberty to trade with an enemy. It may be of interest to trace the successive steps in the process. The Declaration of Paris, 1856, proclaiming the inviolability of enemy goods on board of neutral vessels, went further than the age was prepared to go. Availing themselves of the exception from the Declaration of contraband, belligerents have endeavoured, since 1903, to evade the Declaration by treating almost every subject of traffic as contraband. Neutrals are thus put in a far worse position: for they are no longer paid their freight for the carriage of enemy goods, as in the ante-1856 days—they are actually threatened with confiscation, as being engaged in an illegal traffic. The doctrine of "intention" is brought in, however unmilitary the cargo, and however neutral their port, to condemn them, or at best to subject them to a dilatory and expensive law suit.

This step, adumbrated in 1865 in the American decisions, was supplemented by another of a totally different nature. In 1904-5, automatic contact mines were widely used on the high seas. In this way, the claim of neutrals to continue their trade as in peace time was impaired. It became possible to warn them off a given area by the threat of explosion. The highway of nations became the preserve of the combatant. When this possibility had once been

admitted, the way was clear to interrupt all traffic with the enemy, without an extended category of contraband. It was simply declared that neutrals would run the risk of being blown up if they ventured near the enemy's coast. Ten years ago it was pointed out in the *Revue de Droit International* that if the destruction of neutral ships, under any circumstances, was legalised, according to the desire of the Continental Powers (and, subsequently, the Declaration of London)—the way would be clear for belligerents to enforce a virtual blockade by sinking (under the excuse of necessity) whatever vessels approached the enemy's shores.

In the present war, the evil consequences of the failure to protest effectively against these novel claims is apparent. At the Conference of London they were all accorded a respectful hearing, and made the subject of compromise, instead of being called upon to justify themselves by the practice of nations. The paper safeguards with which the Declaration of that Conference surrounded them disappeared. The novel claims themselves remained—and remained to prove effective. Germany opened the war by laying mines in the North Sea. Britain counter-mined—thus closing the Sea in a great area of its extent to neutrals. But her more characteristic move was the progressive declaration of more and more objects to be contraband, until at last ore, foodstuffs and "nuts," and, in fact, everything but the illogically exempted cotton, are within the term, and Gothenburg is as suspect a port as Bremen. The German reply was the cool announcement, not of blockade of the British Islands, but of an intention to sink all ships resorting thither, without necessarily inquiring whether they might not be neutral. The British answer goes outside the limits of contraband and "warlike areas," and sounds itself on the principle of retaliation. That was the only resource left. And it is tantamount to repudiating International law altogether. Retaliation on enemies is a thing which ought

to be very narrowly limited. Retaliation on friends is indecible. Mr. Balfour has published a laboured defence of it, contending that if an enemy breaks the rules of International law in one particular, the whole system of the Law of Nations is, so to speak, removed from the slate— and neutrals and belligerents alike must proceed without reference to its dispositions. This is mere anarchy, and not even distinguished by the merit of ingenuity.

### The Order in Council of 11th March, 1915.

The precise terms of the British Order in Council will scarcely repay study. The intention is, apparently, to intercept the trade of Germany: but it is the reverse of clear what is intended to be done with it. Apparently the idea is to do with it what the Prize Court thinks proper. That is neither satisfactory to neutrals nor fair to the Court. It is not the business of the Court to say what is to be done with the innocent goods of neutrals, engaged on a lawful voyage to which we object, which we assume to interrupt. The Court is lowered by such a course, and neutrals are injured by it. Their position ought to be plain and certain. If we are determined, in view of Germany's misbehaviour, to interfere with their rights, their liabilities ought to be distinctly stated by the responsible Ministers of the Crown. In points of detail, the Order is far from being as precise as might be desired. It is not only goods coming from, or going to, Germany, that are intended to be intercepted, but also goods "the produce of" Germany. When do goods which have originally come from that country cease to be "the produce" of Germany? Do they ever? The directness of the voyage is not taken into account, so that neutral ships may be stopped from trading between their own ports. And, of course, the protection of the Declaration of Paris is gone, when enemy

goods on neutral ships can be intercepted and subjected to some unknown treatment in the British Court. The goods may be requisitioned--doubtless on the Admiralty's own terms--and if they are enemy goods, it will require a great stretch of the imagination to suppose they will be paid for. Payment after the war is, of course, an illusory thing: it can be thrown on the enemy by the treaty of peace. The only substantial matter is, what is to be done during the progress of hostilities. The Americans seem disposed to accept the Order as a mitigated exercise of the right of blockade. It may be true that an effective blockade may be maintained by a modern fleet at a considerable distance from the enemy's ports. But it remains true that an ineffective blockade is not a binding blockade. If modern conditions make it impossible for cruisers to approach near enough to impose an effective blockade, the right conclusion is, not that ineffective blockades are valid, but that blockades must be abandoned. The truth is, that blockading has become less safe, and requires more ships than it would have done a few years ago--end that is all. There is no call for a revolution.

#### *The Panariellos.*

This curious case concerned a shipment of silver ore, made to England, under the directions of a German purchaser, by a French-registered company working in Greece. Was the ore subject to capture as on a trading with the enemy? It is well settled that an ally may be liable to have his cargo seized if he trades with the enemy;<sup>1</sup> and the French vendors were in this case very anxious, and so far as the Criminal law goes, perfectly well entitled, to repudiate any attempt to carry on such trade, and to deny all criminal intention. But it must be obvious that the criminal penalties lately denounced against certain

<sup>1</sup> *The Neptunus* (6 C. R. 403); *The Naiade* (4 id., 251).

miscellaneous acts of enemy trading cannot apply to acts done by allies *dehors* the realm. All that persons not subject to British jurisdiction are liable to is the confiscation of their property engaged in trading with the common enemy, and in such trading, moreover, as comes within the internationally recognised prohibition. There is, or should be, no question in prize cases of what we, or any other allied State, have thought fit to prohibit under criminal penalties to our own subjects by Municipal law.

There seems considerable room to doubt, whether it is "trading with the enemy," in an international sense, to send a ship to sea laden with his goods according to his directions but not from his territory, after the outbreak of war. The condemnation of this cargo of silver, destined for England, would be difficult to justify by any reference to precedent; indeed, *The Samuel* (4 C. R. 284) is against it. But it is further very doubtful whether the French company ought not, for the purposes of the case, to have been treated as Greek. There are numerous cases in which British subjects, established in Denmark and Portugal, have been permitted the privileges of Danes and Portuguese when this country was at war with France: *The Danaus* (4 C. R. 255 n); *The Emanuel* (1 C. R. 302); *The Ann* (Dods. 223); and *The Indian Chief* (3 C. R. 22). In one American case, *The San José Indiana* (2 Gall. 268), an enemy carrying on business in Portugal was actually allowed the privileges of a friend. The distinction no doubt exists, that in these cases the individual was not only carrying on business, but was personally domiciled within the neutral territory; whilst in *The Panariellos* the company working the Greek mines may not be thought to have anything like a personal domicile there. But as a company cannot have a personal domicile at all, the mere fact that its head office may be at Paris ought perhaps not to militate against the consideration that its business is substantially Greek. It is not

necessary to argue for the extension of the rule of *The Emanuel* from the case of neutral domicile to the case of neutral house of trade. There are doubtless weighty arguments against such a step—it is more than doubtful how far an Englishman who remained in England, while carrying on through a manager an independent business in Portugal, would ever have been accorded the liberties of a Portuguese. But on the whole, if a company, though incorporated by French law, and possibly having an office in Paris, is substantially managed and carried on in Greece, it seems probable that the analogy of a belligerent individual domiciled and carrying on business in a neutral country would properly apply. It is possible, however, that silver ore might be regarded as contraband, and then *The Neptunus* (6 C. R. 403) would withdraw this protection: unless, indeed (as is submitted), the company were formed of neutral individuals and had no substantial connection with the belligerent country of its birth.

It should, however, be once more pointed out that the terms of the British Proclamation against "Trading with the Enemy" have nothing to do with the terms on which the goods, either of Allies or of British subjects, can be seized at sea. No such power of seizure is or could be conferred by the Statute and Proclamation; and although, as Lord Skerrington remarked in *The Orenstein* ([1915], S. C. 55), it may be very inconvenient that the two things should not coincide—penalties for trading, and capture of cargoes—it is difficult to see how, by municipal legislation, a nation can, as against its allies, confer on itself powers which by the Law of Nations it does not possess.

#### National Character.—*The Clan Grant.*

Another highly important case on national character is *The Clan Grant* (16th March, 1915). It is distinctly contrary

to the fluent dictum that "place of business is decisive for all purposes of national character in war." The place of business was in Khartoum; the domicile of two of the three partners was at Hamburg. Evans, P., held that their property in a cargo of beeswax shipped by the firm in neutral or British territory was confiscable as enemy property on board a British ship. The question of the position of the remaining one-third was not raised, as the Crown waived the point that the third partner, though managing the business in Egypt, was certainly a subject of, and probably domiciled in, Germany. There is no doubt of the correctness of the President's decision—but it may come as a surprise to those who have assumed that German firms which are continuing their operations here can export and import goods without liability to capture. Possibly the fact that the Crown does not interfere with them, or does put them under supervision, may be construed by the Court as equivalent to a licence to trade. In the latter event it certainly is; but (apart from the Alien Enemy Cases) it does not appear to be so in the former.

#### Captors' Freight.—*The Roland*.

In this case the Court wisely and properly (if it may so be said) adhered to the established rule, according to which no freight is to be paid to the captor for goods on board ships which are seized as enemy property and taken to an unexpected destination. Any other rule would, as Lord Stowell said, in *The Fortuna*, involve an inquiry difficult of execution and uncertain in result. The goods have not been taken to the place where the owner wanted them. No one can say exactly what he ought to pay for having them taken where the captors have brought them. In *The Roland* the argument in favour of allowing a reference to ascertain a proper sum to be paid to the captors as

*pro rata* freight was attempted to be fortified by an allegation that the German Municipal law--the law of the flag under which the shipment was made—allows it. Such a rule cannot alter the general principle laid down by our Court as a rule of International law, over-riding all municipal legislation, including our own.

### Belgium.

The penal requisitions which are said to have been imposed by the Germans as a means of coercing Belgian refugees to return to the country cannot be defended. The sole legitimate purpose of requisitions is to serve as a substitute for the supplies which, according to the usage of war, might be demanded for the subsistence of an army from the territory it occupies. Penal requisitions are quite illegal; and they cannot have the excuse of military necessity, unless that can be pleaded for any and every measure which a belligerent thinks desirable.

### Retaliation in War.

We have touched above on the retaliatory measures directed against German trade. The further question remains of the propriety of retaliatory measures against German officers. Submarine officers who have attacked merchant vessels are, it seems, though well treated, subjected to a certain moral stigma by being segregated from other prisoners. Germany protested, and it might have been regarded as a sufficient reply, to observe that Great Britain would be quite content if all British officers in German hands were treated as well. The question has been too much treated in the Press as though the reprisals exercised on these officers were intended as a form of penalty upon them personally. Colour was unfortunately given to this view by the official statement which talked of inability to recognise them as honourable opponents. It

was unnecessary and impolitic to adopt this line. Vicarious retaliation is a common thing in war. To retaliate on the instruments of a supposed improper policy is quite permissible as a means of putting stress on the authors of that policy—and it need not be coupled with a denunciation of the tools, who, if not entirely innocent, are yet placed in a difficult and delicate position. There are some acts which are so brutal and shocking that the instrument cannot even be excused by instant terror. But there are others which may conceivably be represented to a subordinate officer as dreadful, but justifiable, exercises of the rights of war. In these cases, the better policy is to avoid personal quarrels with the subordinate—though it may be politic, and is certainly lawful, to treat him with severity.

The analogy of the spy does not help us much. For the spy is always and necessarily a volunteer and a free lance. He acts singly; and if he does not like his allotted job, he can easily desert. As was pointed out in these columns three or four years ago, the spy is treated severely because of the personal quarrel which the soldier originally had with him. He betrayed his confidence. And he betrayed it deliberately. For he was outside the power of his own side, and he chose to carry out his treachery.

---

### The Alien Enemy Cases.

These were briefly alluded to in our Notes of last February. A perusal of the judgments *in extenso* only confirms the view that the decisions depart from established precedent on little or no authority. Civil War cases are not enough: a rebel remains a subject. *Wells v. Williams* is not enough: it was decided on very particular facts, to which the Court does not allude, but *Alciator v. Smith* is directly in point, and is ignored. The opinions of Lords Davey and Macnaghton in *Janson v. Driefontein Consolidated*

*Mines, Ltd.*, are ignored. As to the status of foreign-owned companies, registered in this country, it is agreeable to find the views expressed in these pages adopted in full by Sir H. B. Buckley, the first authority on Company law. On the whole, the judgments in the other cases fail entirely to convince; or even to adduce food for argument. They merely assert.

### Force Majeure.

In *Millar v. Taylor* (1st and 8th March, 1915), it was decided that the prohibition of the export of sugar and confectionery, issued on August 10th, cancelled a contract for the sale of confectionery for export. The performance of the contract *i.e.*, the mere delivery in the United Kingdom, would appear to be neither impossible nor illegal—but in fact it would have been so, since the course of business was that the vendors were really exporters. The Customs authorities paid them the sugar drawbacks as on an export, and although the country of export would subsequently be determined by the British purchasers, the contract of the vendors was benevolently regarded by Rowlatt, J., as a contract to export. Its performance thus became illegal; and being illegal (for however short an actual period) by British law, there was no need to inquire whether it was an impossibility for the cessation of which the parties might reasonably be required to wait. It instantaneously cancelled the engagement. It is difficult to follow this reasoning, and to regard an Irish firm who engaged to supply goods to England for future export, as an exporter merely because, for convenience, the Customs drawbacks were paid when the goods left Ireland. If the contract was to supply goods, not as exporters, but for export, the stringent rule discharging the contract would be inapplicable. We should have to apply the much more difficult rule which cancels a contract when its fulfilment depends on the existence of a particular state of

affairs—in this case the continued power of the purchaser to export. The Coronation Seat Cases threw the law on this subject into the vaguest uncertainty. Previously, it was agreed that a change of circumstances made no difference—unless it destroyed a specific thing, the subject-matter of the contract: or destroyed the personal capacity of an individual to execute it. But these cases extended the cancellation to all instances where both parties contemplated a certain state of affairs, as the foundation of the contract. And since it was also held that cancellation leaves sums in the nature of premiums irrecoverable, the inequitable result follows that A. may lose all benefit from a contract with B., whilst unable to recover from that personage sums already paid under it—at any rate, if the payment was not voluntary and premature. Was, then, the continued power of immediate export the foundation of the contract in the eyes of both parties? Is it not more likely that, if they had been interrogated on the matter, both would have said that of course they expected export to be uninterrupted, but that, if it were not, the buyer would assume the risk? The case is a good example of the difficulties which must necessarily arise when the apparently benevolent rule of the Coronation Seat Cases is put in actual application. No one can say how far the parties thought of contingencies, thought of them as conditions of the contract, or would have regarded them had they thought of them. That they probably never thought of untoward events by no means shows that they meant their contract to be subject to all going well and smoothly.

---

#### Requisition.—*The Antares.*

In *The Antares* (*Times*, 1st and 8th March, 1914), a particularly audacious argument was advanced. A Swedish vessel had been brought in on suspicion that her copper cargo was contraband. Once within the jurisdiction, it was claimed by the Crown in virtue of its powers to requisition supplies under

the *jus angarie*, as an act of State against a foreigner. It is obvious that the *jus angarie* can only be exercised within the territory of the belligerent Power, or in that of its enemy (or perhaps its allies). And the Crown cannot take advantage of its own act in bringing a neutral ship within its territory for trial, to seize it there. It is there for one definite purpose only. The defence of "Act of State against a foreigner," which might be good in a municipal Court (*Buron v. Denman*) is out of place in an international one. The President avoided a decision on this point; and decided the question on the narrow ground that O. XXIX r. 2 of the Prize Rules conferred no power on the judge to release property to the Crown if there was any reason to believe that it was entitled to be released (to claimants). The Registrar had made such an order, and his Lordship simply reversed it; leaving the Crown to enforce its *jus angarie* (if any) and its acts of State (if such) by other means.

#### Ship's Nationality.—*The Oriental*.

Here we have the case of an asserted Swedish yacht, or half-Swedish yacht, the national character of whose papers and register is not stated. That she was flying a "Hungarian" flag is clearly an immaterial circumstance. There is no "Hungarian" flag; the national tricolour is not worn by merchantmen, and its display is a mere ornamental decoration, like the display of the Irish harp on an Irish boat. Captors were allowed to adduce evidence that the word "Hungaria" was partly decipherable on her stern. This is of doubtful propriety; but in any event, there is nothing to prevent a Swede from calling his yacht *Hungaria*, especially if she is part-owned by a Hungarian son-in-law. She had a Swedish master and crew, and was entered in a Swedish yacht club. In these circumstances, the most that could have been done was, it is submitted, to condemn the moiety of the Hungarian part-owner. The Court, however,

decided to condemn the whole. It was argued that the vessel (if Hungarian) ought to have had the days of grace for exit allowed by the Hague Convention. That grace is probably facultative merely; but in any case the President rejected the argument, because the Convention only applies to merchant vessels—and a yacht is not a merchantman. That is a narrow construction which perhaps takes insufficient account of the intention of the Treaty, which was to except warships, and not to attack vessels of pleasure.

#### "Restraint of Princes."

Linseed was shipped from Buenos Ayres in the ss. *Andrew* and the *Orelina*, and became a constructive total loss, having sustained such a depreciation and deviation as amounted to a loss of the venture. The insured claimed on a policy insuring loss by restraint of princes (*Sanday v. B. & F. Marine Insurance Co., Ld.*, 1st Febr. 1915). It has long been a moot question whether the acts of the British Crown come under this term or whether it is not properly limited to the acts of foreign potentates. In the case of this linseed, the voyage to Hamburg was prevented, not by any act of a foreign Power, but by the outbreak of war and the consequent coming into play of the general rule against enemy traffic. The fact that British and French cruisers directed the ships to proceed to a British port does not affect the question. Was the ordinary prohibition against completing a voyage to the enemy country, then, a "restraint of princes." Bailhache, J., held that it was, but the weight of authority seems to be very decidedly the other way. The desire to hold the shipper covered operated to make bad law. It is dubious, in any event, whether the ordinary operation of the ordinary law, as distinct from a specific Governmental interference, can ever be styled a "restraint of princes."

TH. B.

### VIII.—NOTES ON RECENT CASES (ENGLISH).

TWO long-established principles were recently considered in the House of Lords, and while one was modified in a way some great judges have suggested it should be, the other, with all respect to the distinguished tribunal in question, was applied very literally and even in a somewhat pedantic way.

The first principle was as to the grounds on which a fixed sum reserved in a contract as payable for breaches of its stipulations is to be regarded as a penalty. Most of the rules as to this have been finally settled many years ago; but one has never received the complete acquiescence of lawyers. It was this, that where the sum reserved is made payable on the breach of any one of a number of stipulations, the breach of some of which would in the nature of things result in different amounts of damage, the sum must be considered not liquidated damages, but a penalty against which the Court would grant relief. This rule was criticised by Jessel, M.R., in *Wallis v. Smith* (L. R. [1882], 21 Ch. D. 243, at p. 262), and by Rigby, L.J., in *Willson v. Lore* (L. R. [1896], 1 Q. B. 626); but nevertheless it has remained the established principle on which the Courts have acted. Now, however, in *Dunlop Pneumatic Tyre Co., Ltd., v. New Garage & Motor Co., Ltd.* (L. R. [1915], A. C. 89), the House of Lords have decided that it only applies where the amount reserved would be plainly exorbitant if exacted for the breach of some of the stipulations to which it is annexed.

The second principle related to the construction of wills. It is a rule of interpretation that where a bequest is made to an object so described that the description will apply with absolute accuracy to one object only, this object will take although there are other objects to which the description will partially apply. The good sense of this rule

cannot be questioned. But surely it should be limited. If a testator made a will according to the law of his domicile and intended to be construed and enforced by the law of his domicile, surely his descriptions of the objects of his bequests should be *prima facie* held to apply to things answering them within the country of his domicile. If I, living in London, leave a gift to, say, "the Charitable and Benevolent Society of St. John," and it turns out that the full name of the Society is the "London Charitable and Benevolent Society of St. John," but that there is in Canada a "Charitable and Benevolent Society of St. John," without qualification, is the rule to be rigidly applied, and the latter society, of which I may never have heard, be declared to be entitled to my gift? That is what the House of Lords has decided in *National Society for the Prevention of Cruelty to Children v. Scottish National Society for the Prevention of Cruelty to Children* (L. R. [1915], A. C. 207), reversing the judgment of the Court of Session in Scotland. There the testator (a Scotsman residing in Scotland) left, among other bequests to Scottish charities, a legacy to the "National Society for the Prevention of Cruelty to Children." There is in Scotland a society of this name, but it is called formally the "Scottish" National Society. There is also a society in England of this name without qualification. This society does not carry on work in Scotland. The House of Lords—though there was no evidence to show that the testator knew of the existence of the latter, and there was evidence of his interest in the former society—held that the latter took the gift. If the "National Society" had its habitation in, say, California, would they have come to the same decision? In principle they should, since, so far as Scots law is concerned, England is just as much a foreign country as the United States. The decision can only result in the defeat of testators' obvious intentions, and promote that

litigation over charitable bequests which is making sensible testators hesitate to bequeath to charities money which their experience shows is as likely as not, through some slip in description, to be bequeathed to lawyers. In passing, it may be noted that there was not a single Chancery lawyer among the learned lords who heard this case.

What advantage arises from reporting cases heard before a tribunal which declares that it is not bound by its own previous decisions? In the *Hastings Peerage Case* (8 Cl. & F. 144) the Committee for Privileges held that the assembly of May 29th, 1290, was a parliament for peerage purposes, and that, consequently, one who was proved to have sat in it held a peerage by writ. In the *St. John Peerage Claim* ([1915], A. C. 282) the same Committee held the reverse. Lord Parker of Waddington laid down the rule that previous decisions did not bind the Committee, and then proceeded to state the principles upon which cases before the Committee were decided. How those principles came into existence except by virtue of previous decisions his lordship did not explain. The result is that the descendant of a man who sat in this assembly, which the King ignorantly described as *plenum parliamentum*, and whose heir was summoned by writ to many assemblies which are admitted to have been parliaments, is told that there is no proof that his ancestor ever was a peer, which may be law, but on the face of it is not common sense.

A point is decided in *James Roscoe (Bolton) Ltd. v. Winder* (L. R. [1915], 1 Ch. 62) with regard to the rule in *Hallett's Estate* (L. R., 13 Ch. D. 696) which, it seems strange, has not been decided before this. *In re Hallett's Estate (supra)* laid down the principle that where a trustee paid trust money into his private banking account, and afterwards drew money for his own use from the mixed fund, he must

be taken to have drawn out his own money first. This presupposes that he had money of his own to draw out. *John Roscoe (Bolton) Ltd. v. Winder (supra)* decides that where he has none his drawings must be taken as what, in fact, they are, drawings out of the trust money, and that when he subsequently pays in money of his own, this is not to be taken, in the absence of evidence to that effect, to be intended to replace the trust money which he has improperly appropriated.

The case of *In re Caledon (Earl), Alexander v. Caledon (Earl)* (L. R. [1915], 1 Ch. 150) is not altogether a satisfactory decision. There a testator devised a house to his wife for life, with remainder to his first and other sons in tail male, and he bequeathed certain chattels to his wife for life, and then to the person "who shall at her death become entitled to the possession" of the house. The wife and eldest son disentailed the house and resettled it to such uses as they should appoint, and in default of appointment, on the uses declared in the will. This disentailment would seem to put an end to all remainders following the eldest son's estate tail so far as the will was concerned, and to make him the sole person who could take the house under it. In other words, he became the only person who could obtain possession of the house under the will; any other person obtaining possession would do so under some other act or instrument. But Joyce, J., held that the gift of the chattels did not vest in him, but was a contingent bequest which will vest in the person who, on the wife's death, is entitled to possession of the house. If that person is a purchaser for value of the house from the wife and son, will he be the person entitled? Or, are the words "shall be entitled" in the will to be read in such event "should have been but for the sale of the house entitled" to the possession of the house?

Delivery is necessary to complete a gift of chattels. It is not necessary to complete a transfer of them in equity by declaration of trust; but it has long been a principle of equity that, where a gift was intended, the words of gift will not be held a declaration of trust in order to make a gift, bad at law, binding in equity. In *donationes mortis causa* actual delivery is not necessary; what may be called symbolic delivery is sufficient. But where there is symbolic delivery merely, is the Court to hold that that which all the evidence indicates was intended to be a gift *inter vivos* was a *donatio mortis causa*? That would seem to be the effect of *In re Wasserberg, Union of London & Smith's Bank, Ltd., v. Wasserberg* (L. R. [1915], 1 Ch. 195). It is true, Sargent, J., says in his judgment, that he is convinced that if the deceased there at first intended a gift *inter vivos*, he afterwards changed his mind. The grounds for this conviction are not stated, and certainly are not very apparent.

It should be noted that *Lord Ashburton v. Nocton* (L. R. [1914], 2 Ch. 211, referred to in our November issue, p. 90), has been reversed by the Court of Appeal, Kennedy, L.J., dissenting. (See *Ashburton (Lord) v. Nocton* (L. R. [1915], 1 Ch. 275.)) The practical ground of convenience given by Swinfen Eady, L.J., is probably the safest on which to base this reversal.

In a certain very learned treatise on equity, the writer, after stating in the text that a restraint on anticipation imposed on a legacy to an unmarried woman did not prevent her being put to election if, in the same will, property to which she was entitled was given to another person, added in a foot-note, "Kekewich, J., has decided to the contrary: *Haynes v. Foster* ([1901], 1 Ch. 361)." Some critics expressed themselves in strong terms about this note. Well, at any rate, it and the text were both correct: *In re Hargrove, Hargrove v. Pain*. (L. R. [1915], 1 Ch. 398).

It is important to remember that the effect of the Stamp Act 1891 (54 & 55 Vict., c. 39), sect. 14, sub-sect. (4), is that an unstamped document which requires a stamp cannot be received in evidence except in criminal proceedings for any purpose whatever, including a collateral purpose (*Fengl v. Fengl* (L. R. [1914], P. 274)).

During the continuance of the war the cases of *The Tommi* and *The Rotersand* (L. R. [1914], P. 251) will have an important effect on attempted sales of vessels belonging to members of belligerent States. These vessels belonged to a German company. In July, 1914, they left German ports, and on August 1st (the date of the Declaration of War between Germany and Russia) they were on the high seas. Whilst thus *in transitu* an attempted transfer took place from the German company to an English company whose shares were wholly held by Germans. At that time they were entitled to fly, and did fly, the German flag. There was no delivery of the vessels before the war broke out between Great Britain and Germany and no completion of the steps required for legal transfer. On August 5th (the day after the Declaration of War between these countries) these vessels were detained in England and Scotland respectively by the proper authorities. The President of the Admiralty Division (in Prize) made an Order for the detention of the two vessels on the grounds that (1) The nationality of a vessel is determined by the flag she is entitled to fly, and at the time of seizure by the authorities here that flag was German; and (2) That the alleged transfer *in transitu* was invalid, as mere communications which may suffice to bind the parties in time of peace are insufficient to change the ownership of the property in time of war, as against captors whether imminent or actual belligerents, and he expressed a doubt whether a company nominally English but consisting (as in this case) entirely of aliens can own a British vessel.

With this case a useful comparison may be made with that of *Robinson & Co. v. The Continental Insurance Company of Mannheim* (L. R. [1915], 1 K. B. 155). In the latter case Bailhache, J., decided that an alien enemy, if objection be taken by the defendant, cannot sue as plaintiff in our Courts and cannot proceed with an action pending in these Courts while the state of hostilities which makes him an alien enemy lasts. "Whether he can sue or proceed with his action if no objection be taken by the defendant is perhaps open to doubt." But "there is no rule of Common law which suspends an action in which an alien enemy is defendant, and no rule of Common law which prevents his appearing and conducting his defence" either personally or by counsel. The learned judge, in the course of his judgment, says: "I am not such a convinced disciple of Rousseau as to be able to base any opinion upon the principles of social compact." The learned editor of the *Law Reports* (Sir Frederick Pollock) has appended a note to this observation that "the doctrine of the social contract as found in American publicists is derived from Locke rather than from Rousseau. See Scherzer, *The Evolution of Modern Liberty*, New York, 1904"!

The Court of Criminal Appeal had to consider unusual circumstances, and their effect, in the case of *The King v. Kellerridge* (L. R. [1915], 1 K. B. 467). A juror, after the judge had summed up in a criminal trial, separated himself from his colleagues, and, not being under the control of the Court, conversed, or was in a position to converse, with other persons. The Court held that this was an irregularity which rendered the whole proceedings abortive, and that it was not necessary or relevant to consider whether the irregularity has in fact prejudiced the prisoner, and that the only course open to the Court was to discharge the

jury and commence the proceedings afresh. It appeared that, after the summing up by the judge, the jury, upon the trial of a prisoner for felony, expressed their desire to retire and consider their verdict. The Court bailiff, having been duly sworn, proceeded to conduct them to the jury-room. One of the jurors, apparently not understanding what they were intended to do, departed from his colleagues and left the building, and was absent for about a quarter of an hour, when he rejoined his colleagues, his absence apparently not having been noticed. After some deliberation, the jury returned into Court and gave their verdict, finding the prisoner guilty. The conviction was therefore quashed.

At the present time the decision in *Glamorgan Coal Company v. Glamorganshire Standing Joint Committee and others; Powell Duffryn Steam Coal Company v. Same* (L. R. [1915], 1 K. B. 471), is valuable. The cases were tried before Mr. Justice Banks without a jury on the preliminary questions of liability. He decided that "The power of the Chief Constable of a County, in times of emergency, to strengthen his own police force by the addition of constables belonging to the police force of another police authority, is not limited to cases in which his own police authority have, under sect. 25, sub-sect. 3, of the Police Act, 1890, delegated to him the power to do so. He is, by virtue of his office, under a duty to preserve the peace and to protect life and property in the county, and, in the discharge of that duty, he may, when necessary, engage the assistance of outside police, and he may do so upon the terms, amongst others, of providing them with board and lodging. The cost of providing such board and lodging may, subject to examination and audit by the Standing Joint Committee of the County, be recovered by him from the County Fund, under sect. 18 of the County Police Act 1839, as being extraordinary expenses necessarily incurred by him in the execution of his duty."

J. H.

## SCOTCH CASES.

In an action of damages for collision, *The Steamship Beechgrove Co. Ltd. v. Aktieselskabet "Fjord" of Kristiania* ([1915], 1 S. L. T. 19), in which the defenders took the plea of compulsory pilotage, the collision took place in the Clyde, and the defenders' ship was at the time in charge of a licensed pilot. The Act of Parliament applicable to the Clyde declares pilotage to be compulsory within the River Clyde as distinguished from the Firth of Clyde, the boundary between the two areas being defined by the Statute. The defenders' ship, which was the incoming vessel, had not reached the River Clyde as so defined—and was thus outwith the area in which the Act made pilotage compulsory. But the bye-laws of the pilotage authority (which were not challenged as *ultra vires*) provided that pilots should go on board incoming vessels, not at the boundary of the compulsory area, but at the port of Greenock, four miles further down the Clyde, and the rates payable under the bye-laws applied to the whole journey from Greenock to the destination of the ship. The defenders' ship had passed Greenock and had taken a pilot on board there, and the case was taken on the assumption that the collision was due to his faulty navigation. On these facts the First Division (Lord Skerrington dissenting) sustained the plea of compulsory pilotage, on the ground that, although the ship had not reached the compulsory area, the pilot was compulsorily in charge, and that, accordingly, the relationship of master and servant was never constituted between the defenders and the pilot. The judgment is in line with the cases of *The General Steam Navigation Co. Ltd. v. The British and Colonial Steam Navigation Co. Ltd.* (L. R., 4 Ex. 238), in the Exchequer Chamber, and *The Charlton* ([1895], 8 Asp. M. L. C. 29), in the Court of Appeal, although there is this difference in the facts that,

in the earlier cases, the ship which pleaded compulsory pilotage had passed through the compulsory area but had not reached the point at which, under the bye-laws, the pilot left the vessel. Lord Skerrington's dissent seems hardly to give sufficient weight to the consideration that the constitution of the relationship of master and servant is necessary if the shipowner is to be liable for the pilot's fault. He makes no serious attempt to distinguish the English cases, and his view, if adopted, would lead to an unfortunate divergence between the laws of the two countries.

The decision of the same Court in *Wilson v. Glasgow & South Western Railway Company* ([1915], 1 S. L. T. 8) is of somewhat doubtful soundness. The action was one of damages for personal injuries, brought by the father of a young boy who had been injured in a goods hoist belonging to the defendants. The boy, who was between seven and eight years of age, had gone to the station where the hoist was situated in order to meet his father, and he stepped on to the hoist, which was used for carrying goods from a bridge to the station platform. The front edge of the floor of the cage was about six inches away from the wall of the well, and the landing in the bridge projected about five and a-half inches beyond the wall. As the cage was ascending from the platform to the bridge, the boy was injured in consequence of his foot being caught between the floor of the cage and the edge of the landing. The pursuer averred that the defendants and their servants allowed children and other persons to travel in the hoist. The Court (reversing the judgment of Lord Anderson, dissentiente Lord Skerrington) dismissed the action as irrelevant. The Lord President, who delivered the judgment of the majority of the First Division, held that there was no relevant averment of faulty construction, and that the defendants could not be expected to anticipate the accident which happened. This

may quite well have been the case if the lift had been used solely for its proper purpose of carrying goods, but it is doubtful soundness in the case of a lift which, on the pursuer's averment, was allowed to be used by young children. The child was in the station with the rights of a licensee; the hoist was an attractive plaything; and the accident showed that it was dangerous. There would thus seem to have been present the same elements of allurement and danger as the House of Lords, in *Cooke v. Great Western Railway of Ireland* ([1909], A. C. 229), held to be sufficient to entitle a jury to find for the plaintiff. No doubt in *Cooke's Case* the dangerous plaything was a turntable which was out of order at the time, but this hardly seems sufficient to distinguish the two cases.

In a prosecution under the Trading with the Enemy Act of last year, *H.M. Advocate v. Innes* ([1915], 1 S. I. T. 105), the panel (the Scotch phrase for an accused person) was charged with having in October, 1914, written and posted a letter to a neutral, requesting him to ask certain enemies whether the panel could deliver to the said enemies any goods for summer orders, and thus attempted to trade with the enemy. The panel pleaded in the first instance that the indictment did not set forth an offence, because the letter was addressed, not to an enemy, but to a neutral who was not said to be the agent of an enemy. The Lord Justice-General repelled the objection, holding that a person desiring to trade with the enemy might select a neutral as intermediary, and thus attain his object indirectly. A second objection was taken that the indictment did not disclose anything more than preparation to commit an offence, but the Lord Justice-General held that, while the writing of the letter might be only preparation, the posting was an overt act which the jury might hold to be an attempt. The case was accordingly allowed to go to trial, but the panel was ultimately found not guilty.

In *Burrell v. Burrell's Trs.* ([1915], 1 S. L. T. 101), shipping shares belonging to a trust were bought by the wives of two of the trustees, and the transaction was challenged by a *cestui que trust*. It was proved that the ladies had separate estate which they managed themselves, and that they bought the shares on their own initiative and not at the instigation of their husbands. The shares had been advertised by the trustees (as there was no market for them on the Stock Exchange), and they had been specially offered to the other shareholders of the companies. The price paid was a full one, being equal to the highest price offered by any other person. The Court rejected the view that the transactions were purchases by a trustee from the trust estate, and they declined to lay down a rule of law that a purchase from a trust estate by the wife of a trustee was necessarily illegal. They recognised that in view of the near relationship between the trustees and the purchasers, the transaction must be strictly scrutinised, but, applying that scrutiny, they held that the transaction must be sustained.

The Finance (1909-10) Act 1910 has been responsible for two decisions. In *Glass v. The Commissioners of Inland Revenue* ([1915], 1 S. L. T. 297), the referee under the Statute had valued certain farm lands as at 30th April, 1909, at the agricultural value. It appeared, however, that at that date there was a strong probability that a body of water commissioners would find it necessary to purchase the lands in question, in order to secure the purity of their water supply, and that they had obtained powers for the purchase of these lands (among others) by agreement. The Valuation Appeal Court held that this was an element of value which ought to be taken into account, and remitted the case to the referee to take further proof. After taking proof, the referee repeated his former findings, holding that the element referred to

by the Court was of such minor importance that it would only lead to a nominal difference in the figures. On the case again coming before them, the Court (Lord Cullen dissenting) held that the referee had failed to give effect to the views they had expressed in remitting the case, and that it was necessary for them to take the matter into their own hands and value the lands on the materials before them. The Court were, no doubt, right in holding that the probability of the Water Commissioners requiring the lands was an element to be taken, but the weight to be given to it was surely a question of fact on which the referee was final. In any view, it is difficult to see where the Court found a warrant for proceeding to fix the value themselves. It will be surprising if the Revenue Authorities do not test the matter in the House of Lords.

---

In *The Commissioners of Inland Revenue v. Miller* ([1915], 1 S. L. T. 189), increment value duty was claimed on the occasion of a sale of lands to a local authority under the Public Health (Scotland) Act of 1897. Sect. 168 of that Statute enacts that conveyances in favour of local authorities shall be exempt from all stamp duties. The sellers to the local authority claimed exemption on the ground that increment value duty was declared to be a stamp duty by sect. 3 (6) of the Finance Act. The Court rejected this contention, holding that increment value duty was not a stamp duty in the ordinary sense, and did not fall within the exemption. They explained the enactment of sect. 3 (6) of the Finance Act as referring to revenue arrangements for collecting duties.

---

A point of some little importance under sect. 8 of the Workmen's Compensation Act was decided in *Keary v. Archibald Russell Ltd.* ([1915], 1 S. L. T. 281). A workman was certified to be suffering from miner's nystagmus, and the medical referee found that the date of disablement

was 2nd October, 1914. He had been employed by the defenders as a miner for fourteen years prior to 2nd September, but on that date he left their employment to join the Army, so that he was not in their employment at the certified date of disablement. The defenders, founding on the terms of sect. 8 (1) of the Act, maintained that he was not entitled to compensation. Sect. 8 (1) enacts that, if certain conditions (which were present) are fulfilled, the workman should be entitled to compensation as if the disease were an accident arising out of and in the course of the employment, subject to certain modifications—one of which is that the disablement is to be treated as the happening of the accident. The employers argued that the disease must be regarded as an accident which took place at the date of disablement, and that as the workman was not employed by them at that date the accident did not arise out of and in the course of the employment. The Second Division rejected this contention as leading to an anomalous result which was not necessitated by the terms of the Act.

---

We have an illustration in *The Glasgow Insurance Committee v. The Scottish Insurance Commissioners* ([1915], 1 S. L. T. 217) of the wide nature of the powers which the National Insurance Act has conferred on the central administrative bodies. The Glasgow Insurance Committee desired to interdict the Scottish Insurance Commissioners from acting on the Drug Accounts Committee Regulations, or laying them before Parliament. The regulations were designed to carry Part I of the Act into effect, but the Glasgow Committee maintained that they were *ultra vires* of the Commissioners. Sect. 65 of the National Insurance Act enacts that the Commissioners may make regulations for carrying Part I of the Act into effect, and that any regulations so made should be laid before

Parliament, and should have effect "as if enacted in this Act." The Court (dissentient Lord Johnston), following the decision of the House of Lords in *The Institute of Patent Agents v. Lockwood* ([1894], A. C. 347), held that they had no jurisdiction to entertain the question. They held that if the regulations were made for the purpose of carrying Part I of the Act into effect, they were in the same position as if they had formed part of the National Insurance Act. The judges who formed the majority of the Court recognised that the case would have been different had the regulations not been made for the purpose of carrying Part I of the Act into effect.

J. S. M.

#### IRISH CASES.

A testator had impliedly given his executor power to carry on the testator's business, but had not set apart any particular assets for that purpose. The Court, in an administration action, had appointed a manager to carry on the business in place of the executor. It may be taken as settled law that this manager was personally liable to the trade creditors for debts incurred in carrying on the business, but was entitled to be indemnified against such liability out of the general assets of the deceased. By subrogation, therefore, the trade creditors are entitled to resort to such assets for the payment of their debts. Although both the arguments and the judgment in *O'Neill v. McGrory* ([1915], 1 Ir. R. 1) discuss these general matters at some length, the particular question in the case seems to be, whether the fact that funds in the action had been carried to the separate credits of legatees ought to free those funds from liability in this respect? It has been laid down that carrying a fund to a separate credit releases it from the general questions arising in the action and makes it subject only to the questions arising in the

particular matter referred to in the heading of the account (*In re Jervoise*, 12 Beav. 209). But still, claimants have not necessarily lost their rights against that fund. Even if it had actually been paid over to a legatee—and putting it to a separate credit cannot have a higher effect than that—a creditor could, on the principle of following assets, enforce his claim against the fund in the hands of that legatee. It was held, therefore, that nothing which had happened had deprived the trade creditors of their right above-mentioned against these funds as well as against the rest of the estate.

We have a rather curious case illustrating certain differences between a power of selection and a power of distribution in *Sheehy v. Nugent* ([1915], 1 Ir. R. 42). A testator bequeathed all his property to "my wife in the first place," and after her death, to "my lawful nephews and nieces, meaning such nephews and nieces and other relations as she deems fit and suitable"; there was no gift in default of appointment. The wife, by her will, left part of the property to two nieces and part to a grand-nephew; the rest was unappointed. First, as to the gift to the grand-nephew: it was held that this was good, because the power was a power of selection and not of distribution, and therefore "relations" did not mean merely statutory next-of-kin. But "where there is a power of appointment among relations which is not a power of selection, but only one of distribution, the objects of the power must be confined to the class falling within the limits of the Statute of Distributions." Second, there was the more difficult question as to the persons entitled to the unappointed part of the property. "The cases on 'relations' are peculiar": *Wilson v. Duguid* (24 Ch. D. 244). The class to take in default (in a selective power) is not the same class as that comprising the objects of the power,

but only statutory next-of-kin. It was held, therefore, that this part of the property could only go among nephews and nieces, and other relations (if any, but apparently there were none) who were next-of-kin of the testator according to the Statute: this class was to be ascertained as at the death of the testator, and its then members took vested interests.

---

Two cases on the scope and application of the Courts Emergency Powers Act 1914 may be noted. *Perry v. Fitzgerald* ([1915], 2 Ir. R. 11) decides that an action of ejectment for non-payment of rent is within sect. 1, sub-sect. 1, of the Act. This action, it will be noted, differs in its nature from the corresponding English remedy, which is an action in the nature of an ejectment on the title, based on the fact that a condition in the letting, as to payment of rent, has been broken. The Irish action is purely a statutory remedy under sect. 52 of the Landlord and Tenant (Ir.) Act 1860, and may be considered as potentially a proceeding for the payment or recovery of a sum of money.

---

The other case is *Irish Land Commission v. O'Neill* ([1915], 2 Ir. R. 66). It relates to the purchase-annuity, the annual instalments whereby a tenant-purchaser, under the Irish Land Act 1903, repays to the Land Commission the amount advanced by them for the purchase by the tenant of the fee-simple of his holding. The case decides that this annuity is a Crown debt: it is public money, and the Land Commission is the instrument for making the advance and collecting the repayment. As the Crown is not bound by either the Courts Emergency Powers Act or the Postponement of Payments Act 1914, proceedings by the Land Commission to recover an unpaid instalment of this annuity from a tenant-purchaser do not come within either of those Acts.

J. S. B.

## Reviews.

[SHORT NOTICES DO NOT PRECLUDE REVIEWS OF GREATER LENGTH IN SUBSEQUENT ISSUES.]

*Outlines of International Law.* By CHARLES H. STOCKTON, Rear-Admiral U.S. Navy, Retired. Charles Scribner's Sons. New York, Chicago, and Boston. 1914.

The qualifications of the Author set out in the title of this work (President of the George Washington University, Delegate Plenipotentiary to the London Naval Conference, Author of *The Laws and Usages of War at Sea*, and of *A Manual of International Law for the use of Naval Officers*) raise an expectation of a practical contribution to the literature of the subject with which it deals; and the orderly method of the work, its succinct statement of principles illustrated by a sufficiency of precedents, and its references to modern opinions and the newer questions and developments of belligerency and neutrality, the whole thrown into vivid relief by the present war, all combine to fulfil that anticipation. In the first part, after defining the scope of International law, which he carefully distinguishes from international State policy and diplomacy, international comity and international ethics, the Author describes the sources of International law and traces the development of the modern system. The second part treats of the "persons" of International law, the various kinds of States, with the ancillary questions of their origin and recognition, their continuity and "succession," rights of mutual equality and territorial jurisdiction with special reference to territorial waters, straits, rivers, inter-oceanic canals, and national rights on the high seas. The third part covers the intercourse of States in time of peace, with particular consideration of the functions of diplomatic and consular officers, international agreements, negotiations, and conferences on special subjects, such as the London Conference for Naval law, and treaties. These international "scraps of paper" have a special interest for the United States which gives them a superior force to municipal laws and reserves the final sanction of them to one branch of the Legislature (the Senate) exclusively. Modern times have added to

this branch of the subject such preventive measures against war as mediation and arbitration, and such acts of constraint short of war as pacific blockades, an adaptation of the term which has justified itself as a practical measure of police.

The fourth part, which deals with the war relations of States, naturally claims special attention. Admiral Stockton's treatment of the subject is noteworthy for its enunciation of the limitations which practical necessities impose on the applications of such well-known general principles as the immunity of non-combatants, and the protection of private property on land, and, in this connection, for his recognition that the theory that private property at sea should be exempted from capture—which the United States have continuously urged—is at present unlikely of acceptance, and that the best line of progress towards this object is by increasing the exceptions of certain classes of ships. The present war is a practical commentary on such general ideal principles as that set forth in the Declaration of St. Petersburg in 1868, that only measures for weakening the military forces of the enemy are legitimate, when the claim is openly made to sink commercial ships, enemy or neutral, without warning or regard for human life, to inflict damage on undefended towns, and to deal ruthlessly with non-combatant inhabitants of the area of military occupation. The Author regards the provisions of the United States Regulations for Armies in the Field as superseded by the Hague Land War Convention, and would eliminate from them such propositions as the right of a military commander to refuse quarter to his opponents when circumstances render it impracticable to take prisoners, and the right of besiegers to drive back non-combatants who have been expelled from besieged towns in order to accelerate their fall by starvation. In connection with the question of reprisals for breaches of the rules of war, he cites, with approval, Professor Holland's suggested conditions of their admissibility, viz., previous careful inquiry into the alleged offences, the impossibility of punishing the real offender, their infliction only with the authority of the supreme commander, and their being not disproportionate to the offence, in no case barbarous, and not by way of revenge, but only to prevent repetition of the offence. The accounts of warfare by sea, including submarine mines (but not vessels), warfare in the air, and the rights and obligations of military occupation of a hostile country may be cited as particularly instructive.

The fifth part treats of the relations between belligerents and neutrals, neutral rights and obligations, contraband (and pre-emption of contraband, which the Hague Convention does not touch), blockade, unneutral service, internment of belligerent forces,—in which, it seems that the Author does not agree with the liberal view taken by the Government of Holland that shipwrecked belligerents rescued by neutral ships and even brought into neutral ports are not bound to be interned—the destruction of neutral prizes, which apparently the United States Naval Code recognises in case of necessity, the transfer of enemy ships to neutral flags, enemy character, and prize jurisdiction, including the International Prize Court set up by the Hague Convention (only as yet ratified by the United States Government). The Appendix includes the texts of this Convention, and of the Hague Arbitration Convention, and the Declaration of London, but not, as one might have expected, those of the Hague Conventions for Sea and Land Warfare. Certain points for criticism may be noted, viz.: the passage in the opening part that a person's final capacity is determined by the law of his domicil, which seems to ignore the adherence of the Continental States to the criterion of nationality for this purpose (though this is referred to in the account of enemy character); the omission of the Danube and Rhine from the list of International rivers; the merely cursory references to nationality and naturalisation, the passing mention only of the claim to take hostages and inflict collective punishment on a hostile population for individual offences against occupying forces; the omission of the Napoleonic, Milan and Berlin decrees against England and the British retaliatory Orders in Council from the account of reprisals, of which we see the counterpart now. But, taken as a whole, the work will rank as an admirable practical sketch of the main outlines of a science, which is essentially organic and must progress with the march of mankind. The present war is re-writing the laws of war and neutrality in many respects. The Author traces the modern development of the whole system from the peace of Westphalia, which followed on the Thirty Years' War in Germany, when the idea of a family of nations first took shape. The present gigantic struggle, perhaps to be known in history as the German War, will, it may be hoped, bring about a like result and eliminate for a considerable period, if not finally, from the policies of nations the ambition for military predominance and the ideal of brute force as the ultimate sanction of International rights.

*The Law relating to the Child.* By ROBERT W. HOLLAND, M.A.,  
M.Sc., LL.D. London: Sir Isaac Pitman & Sons. 1914.

This book, which deals with the law relating to the protection, education, and employment of children, will perhaps be of more value to the social reformer and the legislator than to the practitioner. In spite of the progress which has admittedly been attained in this country in legislative provisions affecting children's education, with notifications, school feeding, exploitation of child labour, physical protection, and special Courts, Mr. Holland is not satisfied. A central authority presided over by a Minister for the Protection of Childhood is, he maintains, quite as necessary as a Minister of Commerce. We quite agree, but we doubt whether in the present experimental stage a codification of the existing law, which he suggests, would be altogether wise. No doubt, in many respects, we are behind foreign nations in our legislative efforts for the protection of child life. No provision, as Mr. Holland points out, is made for the education of children under five, as in Germany, Belgium, and France. But, here again, State imposed systems might prove disastrous in the present experimental stage. The Kindergarten system which Mr. Holland favours is already under suspicion, and will probably be superseded by the Montessori system now on trial in Italy, in this country, and in the United States. It is, by the way, curious that in his comparative study, in the Introduction, Mr. Holland has entirely neglected the American evidence. Both in their legislation and in its administration by children's Courts, the United States are in many respects in advance of Great Britain. On page vi Mr. Holland states that the minimum age for persons below ground, in mines, is *sixteen*. By sect. 91 of the Coal Mines Act 1911 the age is, of course, *fourteen*. This section he quotes correctly on page 132. Those interested in this branch of social reform will find, especially in the Introduction and Bibliography, much of value and assistance in this book.

*Practical Accounts for Executors and Trustees, with Examples.*  
By SYDNEY HODSOLL. London: Stevens & Sons. 1914.

Not only solicitors and their clerks, but trustees and executors, who keep their own trust accounts, should welcome this very practical result of Mr. Hodsoll's twenty-five years' experience in this branch of Accountancy work. As Mr. Hodsoll points out, the fundamental principles of book-keeping are similar in all classes

of accounts, but the methods suitable for Trust Accounts are quite distinct from those generally used in the commercial and business world. An absolutely uniform system for all cases is, of course, impossible, but the leading principles can be indicated and examples given which will be found suitable in the majority of cases. Mr. Hodsoll takes three main divisions, viz.: Executors' and Administrators' Accounts *per se*; Accounts of Continuing Trusts under Wills (Settled Property, etc.); and Trust Accounts under Marriage and other Voluntary Settlements, and gives examples of each class taken from actual practice.

*Recollections of Bar and Bench.* By the Right Hon. VISCOUNT ALVERSTONE, G.C.M.G. London: Edward Arnold. 1914.

It is perhaps as difficult a task for the reviewer to justly appraise an autobiography as it is for the author to write it without incurring the charge of undue egoism. In the present case each reader must form his own conclusion, and decide for himself whether the balance has been consistently maintained by the distinguished Author of this book. Lord Alverstone was, as he states in the Preface, undoubtedly singularly favoured by good fortune at critical periods of his professional career. But a man with Richard Webster's powers of physical endurance, capacity for taking infinite pains, and marvellous memory, was bound to succeed in any profession. It is quite true that unusual and unprecedented opportunities came to him, such as the offer of the Attorney-Generalship, although he had never sat in Parliament or filled the office of Solicitor-General. The real secret of Webster's success, like that of all successful men, lay in his strength of character, which enabled him to make the most of any opportunity for advancement offered to him. Added to this was his determination to fit himself as far as humanly possible for any work which might come his way. As an instance of the former may be cited his first appearance in the House of Commons, after his appointment as Attorney-General. Within ten minutes of taking his seat he was called upon to reply to Mr. Gladstone on the motion relating to the right of Mr. Bradlaugh to take the oath. "I need not say," writes Lord Alverstone, "that I was terribly nervous, and it certainly was a great ordeal for a young man who had never been in the House of Commons except as a spectator." In fitting himself for his profession young Webster went outside the usual routine. He was first sent by his father, an

minent Queen's Counsel, to the office of Messrs. Young, Michell, Teesdale & Nelson, the well-known firm of solicitors. Next he passed his time in the solicitor's office of the Great Western Railway, where he learnt the details of railway rating under Mr. Joseph Fisher, which later stood him in such stead in his practice at the Bar, and finally he became a pupil in the chambers of Mr. E. H. Dodgson, the distinguished pleader. "I made good use of my time there," observes Lord Alverstone, "arriving early every morning and staying late, and became thoroughly acquainted with the ordinary pleaders' work, besides attending judges' chambers with Mr. Dodgson." After his call by Lincoln's Inn, in 1868, Webster devilled for Mr. Keniplay for some months, drafting declarations and pleas. He next devilled for Mr. J. P. Murphy, Scrivener Party, and Mr. Day, taking notes and even conducting cases in their absence. Here, again, he fitted himself for such work by attending Court every day from ten to four, and arriving early in chambers in case any of those gentlemen required his assistance. To this latter practice Lord Alverstone attributes much of his early success at the Bar. "I am satisfied," he says, "there is no more useful way in which a barrister can learn his work at the Bar than being present after having read the brief while the case is actually on in Court." This custom of junior counsel employing an understudy, the learned Author assumes, has largely fallen into disuse. Such is certainly not our own experience, and we venture to think he has been misinformed. With such equipment, natural and acquired, and with such a course of action, it is apparent that even without the assistance of luck, of which he enjoyed his full share, Richard Webster was assured in the highest eminence in his profession. These "Recollections" constitute a faithful record of a strenuous legal career. Lord Alverstone passes in review every phase of his life at the Bar and on the Bench, and devotes separate chapters to the special classes of cases, such as patent cases, compensation cases, and arbitrations, in which direction lay the larger part of his practice. He also treats at length of his practice in the House of Lords and Privy Council, and in International Arbitrations, and concludes with a reminiscence of his connection with athletics in which he played in his undergraduate days such a prominent part, and with a few observations upon his more renowned contemporaries. On some controversial questions which are still unsettled, Lord Alverstone pronounces

domestic opinions. For instance, he insists on the utility of the Grand Jury, and is strongly opposed to its proposed abolition. In Tampery cases in which no criminal conduct is involved, the action of the Grand Jury prevented from coming before the public. The present writer, nearly thirty years ago, was foreman of a Grand Jury which threw out three such Bills. One was a family dispute as to the possession of a photograph valued at a shilling, which one member was accused of stealing! Lord Alverstone is also strongly opposed to the publication in divorce cases of the numerous details with which the Yellow Press delights to regale its readers. He is equally opposed to the proposed fusion of barristers and solicitors. Of public events in which he participated, Lord Alverstone only excites our curiosity by slight references. We should like to have known the reason for the strong pressure which was put upon him to appear for the Government in the Parnell Commission Inquiry. It would also have been of more than ordinary interest if he could have lifted the veil from the mystery which still enshrouds the South African Commission. From the records of his early life at the Bar, the young barrister will learn many invaluable lessons. One practice we have omitted to mention which is not the least important. In any case in which technical details were involved, Lord Alverstone never failed to acquire first-hand knowledge by visiting the *locus quo* and making himself familiar with the place in which the events happened, with the subject of the action, or with the process in respect of which the parties were at variance. From a literary point of view we are precluded from any criticism by Lord Alverstone's own expression of feeling in the Preface. For the general reader there is no doubt much of interest. For ourselves we have conscientiously read this volume twice from cover to cover, and have laid it down with a feeling of disappointment. We are disappointed in the first place that Lord Alverstone has failed to present the picture of his own great personality we had expected, and secondly, that he has omitted to tell us anything really interesting about the many famous lawyers and politicians with whom he was in daily contact.

*The Origins of the War.* By J. HOLLAND ROSE, LL.D.  
Cambridge: The University Press. 1914.

This book contains the lectures delivered by Dr. Holland Rose, Reader in Modern History at Cambridge in Michaelmas term, in their present form they have been brought well up to date.

No one probably is better equipped than Dr. Holland Rose for dealing with the historical reasons for the present War, and, in so far as it has become a struggle between the German and British Empires, with the problem of whether the rupture might have been avoided. No War is inevitable, declares Dr. Holland Rose, and his conclusion is that it might have been avoided by Germany. In arriving at this conclusion, the evidence is marshalled with his usual skill by the Author, and those who desire to arrive at the real causes of the war cannot do better than read this closely-reasoned brief for the British nation.

*The Law Relating to Actionable Non-Disclosure.* By G. SPENCER BOWER, K.C. London: Butterworth & Co. 1915.

This book may be regarded in a sense as the counterpart and complement of the learned Author's former work on actionable misrepresentation. Both branches of the same juridical department, they necessarily intersect and overlap one another at many points. Consequently, Mr. Spencer Bower has been obliged to re-traverse, in the present work, ground already covered by its predecessor. In the latter work Mr. Spencer Bower was able to prefix to his Commentary on Misrepresentation a statement of the law in a codified form. Similar treatment in the present case was found impossible of attainment. "The concepts and principles involved," says the learned Author, "are too fluid and delicate to justify the procrustean extension or compression which would be necessary to fit them into the rigid framework of a code." Another difficulty was the choice of a title. The greater part of the work is adequately covered by the title given above, which is supplemented by the subtitle, "And Other Breaches of Duty in Relation to Confidence and Influence." Under the latter are discussed the duties of disclosure where the relation is that of trustee and *cestui que trust*, promoter and company, principal and agent, parent and child, solicitor and client, physician and patient, and money-lender and expectant heir.

In the Appendix Mr. Spencer Bower discusses a number of terminological questions, the comparative value of jurisprudence and ethics, the Roman law of non-disclosure, and the Scottish law of non-disclosure. These discussions are distinguished, as indeed is the text, by a literary effort of a very high order and are accompanied by a display of classical knowledge and of Common law which are very welcome. This is a masterly exposition of an extremely complex branch of the law.

*The Law of Hearsay Evidence.* By J. B. C. TREGARTHEN. London: Stevens & Sons, 1915.

In this short treatise Mr. Tregarthen has made a distinct contribution to a clearer view of the Law of Evidence. His object has been two fold, to explode the *res gestae* rule, and to draw a clear distinction between original and hearsay evidence. The latter he defines as "any fact, other than the testimony of a witness in the box, which is, or which amounts to, the statement by a person of a fact in issue or relevant to the issue, and which is not otherwise in itself relevant to the issue." This definition is very similar to those of modern writers, such as Taylor and Phipson. Mr. Tregarthen's quarrel with them is that they do not observe their own definitions, but treat as original evidence many kinds of statements which in truth are merely hearsay. With the novel criterion by which a statement, if made spontaneously and naturally, becomes original evidence is, says Mr. Tregarthen, "good neither as a practical proposition, as a principle, nor as an accurate reflection of the existing law." So, too, the terms "evidence" and "relevance" are loosely and improperly used. The former is used indifferently to denote both the facts of which the Court receives testimony and the testimony by which the evidence is brought to the ear of the Court. The term "testimony," contends Mr. Tregarthen, should be used to represent the statement of witnesses in the box, and the term "evidence" reserved to denote the facts which the testimony relates. Any fact admitted by the Court is said by many writers to be relevant, but, objects Mr. Tregarthen, this is a violation of the word. A hearsay statement, though admitted as evidence, cannot cease to be a hearsay statement and become a relevant fact. We have said enough to indicate the original treatment of the subject by the learned Author and the scope of the work.

*The Yearly County Court Practice 1915.* By Judge WOODFALL and E. H. TINDAL ATKINSON. 2 Vols. London: Butterworth & Co.

*The Annual County Courts Practice 1915.* By Judge SMYLV and W. J. BROOKS. London: Sweet & Maxwell.

In both these hardy annuals the war is naturally reflected. In the former this reflection finds greater expression than in the latter. In the *Yearly Practice* a special chapter, entitled The Moratorium, contains such of the Emergency Acts and Rules as are likely to be of assistance to the County Court practitioner. In this chapter are

included all the Proclamations issued under the Postponement of Payments Act 1914 and the final County Court Rules, and under the Courts Emergency Power Act 1914. On the other hand, the Editors of the *Annual Practice* have been content to include only the two Statutes above mentioned with their respective County Court Rules.

In neither *Practice* are the changes in other directions drastic or important. Apart from the war, no alteration in the practice of the County Courts has this year been effected by the Legislature. In July last, the County Court Rules 1914 (No. 3) were issued, consisting of a consolidation of fourteen, out of the seventeen sets of Rules published since the Rules of 1903. The latter, with the Rules of 1914 with Forms, and with three other sets of Rules, viz., Orders XL, XIIB, and XIIBA are included in both *Practices*.

In the *Yearly Practice*, Mr. E. Aylmer Dighy is again responsible for the revision of the Admiralty Chapter. Since this revision, he has rejoined H.M. Navy as Lieutenant-Commander. Mr. Harry Cousins, Registrar of the Cardiff County Court, has revised the Chapter on Costs; and Mr. J. Errington, Registrar of the Carlisle County Court, the Time and Practice Table and Table of Fees.

The Editors of the *Annual Practice* have again followed this practice of entrusting special subjects to experts. Messrs. W. H. Whitelock and Arthur L. Lowe, Registrars of the Birmingham County Court, are again responsible for the Chapters on Costs and Court Fees; Mr. H. H. Sanderson is responsible for Admiralty and Merchant Shipping; and Mr. Gilbert Stone, for Employers' Liability and Workmen's Compensation. The continued publication of this *Practice* in one volume will be highly appreciated by practitioners. In both works the decisions of the Courts are duly brought up to date. The position of both is so assured that commendation is unnecessary.

---

*Contingent and Executory Interests in Land in English Law.* By J. W. SHAW FLETCHER, LL.B. London: Wildy & Sons. 1915.

This historical essay upon the most complex branch of our intricate system of alienation of land is a notable contribution to the history of our law relating to land. To have traced the history of contingent remainders three centuries before the earliest case reported by Williams; to have exposed errors in the definitions given by Fearne, and to have substituted definitions at once more exact

more logical, to have summarised the history of the power of alienating land since the days of Alfred, and to have thrown a flood of light upon the complexities of future interests in land, is indeed a remarkable achievement. It is deserving of something more than passing notice. It was said by Professor Maitland that no one could be a sound conveyancer who was unacquainted with the law of the Year-Books. The truth of this observation is enforced by a perusal of Mr. Fletcher's essay. Apart from the Statutes and such early text books as Glanvil, Britton and Fleta, the Author's theories and conclusions upon the origin and development of future interests in land are based upon the law gathered from cases relating to his subject to be found in the Year-Books. This is building on sure foundations, with the usual result of rendering a subject, otherwise repulsive, full of live interest. As Dr. H. Mansfield Robinson, who contributes a eulogistic Preface, rightly says, the law-student "will find all those legal phantasies of springing and shifting uses, double and naked possibilities, *scintilla juris*, the *cypres* doctrine and when the scisin to serve contingent uses was *in nullibus* or *in genio legis* and the like, which proved such nightmares to his predecessors, resolved into plain and simple devices to meet the various needs of different stages in the evolution of the law of future interests in land."

*Income Tax and Super-Tax Practice.* By W. E. SNELLING. London : Sir Isaac Pitman & Sons.

With this book at his hand no one would have any excuse for making an incorrect return of his income for income tax purposes. At the present moment there are probably few who desire to escape their responsibilities ; but at the same time, in the great majority of cases, incomes have been very considerably reduced and difficult questions arise as to the amounts upon which persons should be assessed. After stating concisely the general rules which should be followed in the preparation and adjustment of accounts for income tax purposes, the Author deals with the average system and the circumstances in which it may be departed from, the preparation of returns (including those of single traders, firms and companies), assessments on lands and houses, repayment claims and super-tax returns and assessments. As the book went to press before the war (dates are omitted both on the title-page and in the preface), a supplement has been added dealing with the emergency.

legislation relating to Income Tax. The bulk of the book consists of an exhaustive *Dictionary of Income Tax*, from which persons in every position in life may readily find the information they require. The specimen accounts and returns constitute a special feature of great value; tables of rates of duty add completeness to the subject. As the Author is on the staff of the Inland Revenue Department, his statements and explanations may be received with confidence.

*Conventions and Declarations between the Powers, concerning War, Arbitration and Neutrality (English, French, and German Texts).* The Hague: Martinus Nijhoff. 1915.

*The World in Alliance.* By F. N. KEEN, LL.B. London: Southwood & Co. 1915.

*Law and Usage of War.* By Sir THOMAS BARCLAY. London: Constable & Co. 1914.

At this moment it is a great benefit to practitioners and others to be able to find, in a convenient and handy form, the full and accurate text of the various International Conventions which enter so constantly into the discussion of legal and political problems in the Prize Courts and in Parliament. Such a collection is supplied by the well-known house of Mr. Nijhoff. It does not contain the Hague Conventions of 1899, rendered obsolete by those of 1907; but it gives in full the Declaration of London of 1909. The English translation appears to be remarkably well done. "Compromis" might have been adequately translated by "Submission," and "Sick-bay" is better than "Sick-ward." A convenient Table shows which Conventions have been ratified by each Power.

Mr. Keen urges a thesis which is often put forward in more florid periods, namely, the institution of an International Parliament, Courts, and police. Parliaments and police are not in high favour just now, however. Besides, Mr. Keen would have the central authority debared from interfering with the "internal affairs" of each State. One would like to inquire (1) how long the Author thinks it would remain so, and (2) whether the influx of a horde of aliens, lowering the standard of living, or otherwise disliked, is a purely internal matter? Unless a satisfactory answer can be given to such interrogations, it would seem that schemes of this kind are premature.

Sir Thomas Barclay's handbook is arranged on an alphabetical scheme. He gives a concise explanation of each of the terms used in International law by which the lay reader is commonly perplexed.

"Pilot" seems to have proved too much even for the Author's acumen—at any rate, he leaves the problem unsolved; but from Floating Mines to Flags of Truce we find a succinct explanation given of every institution that can reasonably be inquired about. A series of Appendices contains the relevant documents, including the Proclamations as to Contraband up to September 21st, 1914. It might have been well to specify in every case which are Hague Conventions; but this is a small detail and should not impair the value of an exceedingly useful compendium.

*The Law of Contract during War.* By W. F. TROTTER, M.A., LL.M. Edinburgh: W. Hodge & Co. 1914.

Mr. Trotter's excellent book is the best that has been brought out on its particular subject. His grasp of principle and his clearness of thought are remarkable in an age of incoherent superficiality. Much industry has been expended on the collection of authorities—*Aciator v. Smith*, for instance, is not easily unearthed. The only complaint that can be made is that Mr. Trotter's own work, after the manner of these treatises, extends only to 76 pages. Part II, of 236 pages, is a very useful reprint of cases, not easily accessible, transcribed in full—which is the only commendable way. Parts III and IV contain a good selection of the recent legislation and Orders up to 29th October, 1914, and an Appendix and Addendum give between them the recent cases and Statutes up to December, but without comment. The Author's luminous discussion of the rights of resident enemies under restraint enables one to hope that the House of Lords may examine the somewhat motiveless judgment by which the Court of Appeal, catching at rather irrelevant American authority, conferred, last January, on the supervised German a very full set of privileges.

**Third Edition.** *British Enactments in Force in Native States.* 6 Vols., with Addenda and Corrigenda. Edited by O. V. BOSANQUET, C.I.E., I.C.S. Calcutta: Superintendent Government Printing, India. 1914.

The first edition of this highly valuable work was prepared by Mr. (now Sir John) Macpherson, Secretary to the Government of India in the Legislative Department in 1890. Mr. A. Williams, I.C.S., was responsible for the second edition, which carried the work up to the year 1899. In the present edition, prepared by Mr. Bosanquet, each volume contains the law in force up to April 19th

## REVIEWS.

1913. In these volumes the term "British Enactments" includes (1) the enactments made by the British Legislature, in exercise of the general jurisdiction which it possesses over its subjects and servants in all Native States; and (2) the enactments made by or under the authority of the British Indian Executive Government, in exercise of the special jurisdiction which it has acquired, usually over all persons in Native States or places therein. The system of the arrangement of these enactments, originally adopted in the first edition and retained in the second, has been radically altered by Mr. Bosanquet. Vols. I, II, and III now deal with the States in direct relation with the Government of India—that is to say, with the administered areas in them—whilst Vol. IV deals with States in relation with Local Governments. Vol. V is devoted to Railways wherever situated. Vol. VI contains General Appendices and the Index. The orders under Acts applied and under local laws have been separated from the rest of the enactments which appear in Vol. I, and form Vol. I and II in the case of the first group of States. In the case of the second group, they form Part II of Vol. IV, and in the case of Railways Part II of Vol. V. Orders relating to the Courts are now treated separately in their appropriate place in Vols. I, IV, and V. In the Appendices are the Statutes in force generally in all Native States, the Acts of the Governor-General in Council, and Orders of the King in Council similarly in force generally. By the reproduction *in extenso* of all enactments which have been issued by the Government in India, except such as are to be found in the volumes of the General Acts of the Governor-General in Council and in the Provincial Codes, to which references are given, these volumes now form a still more complete guide to the British enactments now in force in the Native States than the original publication. This work is worthy of a fuller Index. The present one only contains place-names. There is no subject Index, a serious obstacle to comparative and historical research. In the Addenda and Corrigenda will be found those enactments which are in addition to or in correction of previous enactments which have come into force since April, 1913, and are brought up to April, 1913.

**Fourth Edition.** *Godeffroy on the Law of Trusts.* By S. E. WILLIAMS. London: Stevens & Sons. 1915.

The original object of the learned Author of this work, viz., to provide a treatise upon the general Law of Trusts, to which the student might resort for the principles governing this branch of

our jurisprudence, and in which the practitioner might readily find the authorities bearing upon those principles, has been fully maintained by the present learned Editor. Legislative changes since the publication of the third edition in 1907 have not been numerous. We have had the Public Trustee Act 1906, the Married Woman's Property Act 1907, The Conveyancing Act 1907, The Lunacy Act 1911, The Bankruptcy Act 1914, and The Deeds of Arrangement Act 1914. In spite of this additional material, however, the learned Editor has been able to very considerably reduce the bulk of the work. A good deal of matter which had little or no direct bearing on the Law of Trusts has been omitted, and a large number of cases which have been covered over and over again by subsequent authority have been deleted. This has resulted in a very desirable simplification of the text, and has sensibly relieved the Index and Table of Cases. The authorities are brought down to November, 1914. The Public Trustee Act, together with the Rules of 1912, are given at length in the Appendix with explanatory notes. The few misstatements of the law, and of the effect of certain decisions contained in the last edition, have, we observe, been rectified by the present Editor, who is to be congratulated upon the very marked general improvement effected. We have now a thoroughly reliable text-book, which is at once a guide for the student to the general principles of the law, and for the practitioner to the minutiae of practice. This constitutes a double event seldom achieved.

---

**Eighth Edition.** *Bouvier's Law Dictionary and Concise Encyclopedia.* Third Revision. By FRANCIS RAWLE. Three Vols. St. Paul's, Minn.: West Publishing Company. 1914.

Like so many legal text-books, this standard work owes its origin to the difficulties which its Author encountered in his early days at the American Bar. His endeavours to get forward in his profession, he states in the Preface to the first edition, published in 1839, were constantly obstructed, and his efforts for a long time frustrated, for want of that knowledge which his elder brethren of the Bar seemed to possess. To find among the reports and the various treatises on the law the object of his inquiry was a difficult task; he was in a labyrinth without a guide; and much of the time which was spent in finding his way out might, with the friendly assistance of one who was acquainted with the construction of the edifice, have been saved and more profitably employed. Thus was conceived a work which received the approval of such eminent judges and lawyers as Justice

Story and Chancellor Kent. As the title implies, this is not merely a dictionary of legal terms, but a commentary on the law. Bouvier's plan incorporated the technical expressions relating to the legislative, executive, and judicial departments of the Government; the political and civil rights and duties of citizens; the rights and duties of persons, especially such as are peculiar to the institutions of the United States— for instance, the rights for descent and administration, the mode of acquiring and transferring property, and the criminal law and its administration. The first three editions were prepared by Judge Bouvier, and the fourth from manuscripts left by him at his death. The next edition, published 1867, was edited by a large staff, composed of some of the most distinguished judges and lawyers in the country. The present edition, like those of 1883 and 1897, has been edited by Mr. Francis Rawle, a distinguished Philadelphia lawyer and scholar. Mr. Rawle, a graduate of the Harvard Law School, amongst other legal distinctions, was President of the American Bar Association 1902-3. Under his editorship the work has undergone very considerable expansion, the encyclopedic titles, where necessary, having received much fuller treatment. For many important titles, such as Constitutional Law, Constitution of the United States, Restraint of Trade, and Equity, the Editor acknowledges his indebtedness to Mr. George H. Bates; for International Law, to Dr. Charles G. Fenwick; for Medical Jurisprudence, to Dr. Norman B. Gwyn; and for general assistance, to Mr. R. C. Wildef. No library which caters for students of American law and American institutions can dispense with this American classic.

**Eighth Edition.** *The Law of the Constitution.* By A. V. DICEY, K.C., Hon. D.C.L. London: Macmillan & Co. 1915.

**Second Edition.** *Constitutional Law of England.* By E. W. RIDGE. London: Stevens & Sons. 1915.

The text of Dr. Dicey's new edition is simply a reprint of the seventh edition of his classic treatise on the Law of the Constitution. Upon this further criticisms would be superfluous. Dr. Dicey has, however, written a new Introduction to the present edition. Its object is two-fold. First, to trace and comment upon the way in which the main principles of our constitution as expounded by him have been affected either by changes of law or by changes of the working of the constitution which have occurred during the last thirty years. Secondly, to state and analyse the main constitutional

ideas which may fairly be called new, either because they have come into existence during the last thirty years or because they have during that period begun to exert a new and noticeable influence. In this general review of the development of the constitution since 1884, the principal topics dealt with are the Sovereignty of Parliament, the Rule of Law, the Law and Conventions of the Constitution, New Constitutional Ideas, and General Conclusions. In such a review we agree with Dr. Dicey that it is probably impossible, and perhaps undesirable, to prevent a writer's survey of the past from exhibiting or betraying his anticipations of the future. We do not blame Dr. Dicey for being a strong party man, but we are constrained to express our regret that in what should be a calm and impartial historical survey, he should allow his party bias to cloud his judgment.

His defence of lost causes, such, for instance, as that of the House of Lords, is really puerile and quite unworthy of his great reputation as an international and constitutional jurist.

It is nine years since the first appearance of Mr. Ridges' book, and much has happened since of vast importance to our institutions. Mr. Ridges, however, is more concerned with the phenomena of our various institutions and officials than with constitutional theories. He deals first with the native sources and characteristics of Constitutional Law. Next, with Parliament and the Public Revenue, the Executive, the Judiciary, the Church, Navy and Army, and finally other countries subject to English law. His statements of the law and practice of the constitution, and of the various departments, are, on the whole, satisfactory, but they are not always up to date, nor do they bear evidence of very deep knowledge of legal history.

**Twelfth Edition.** *The Magistrates' General Practice.* By C. M. ATKINSON, M.A., LL.M. London: Stevens & Sons. 1915.

The present edition has increased in bulk to the extent of over one hundred pages, by which number it now exceeds its rival, Stone's *Justices' Manual*. At the same time, it is not really so voluminous, since a large amount of the material in the latter is in small type. This increase is no doubt due to the exceptional legislative activity of the past year. In addition to the War Emergency Statutes, numerous Acts of a more domestic nature have been passed, such as the Milk and Dairies Act 1914, amending the Sale of Food and Drugs Acts; the Bankruptcy Act and Deeds of Arrangement

Act 1914, whereby the Bankruptcy Act 1913 was repealed, the Affiliation Orders Act 1914, and the Criminal Justice Administration Act 1914. The complexity due to these numerous alterations in the law, evidence, and procedure, is further increased by the postponement in the case of some Statutes of the operation of some of their provisions. Decisions in the High Court have also been both numerous and important. With all this additional matter increased bulk could scarcely have been avoided. Mr. Atkinson is careful to point out how, under the Defence of the Realm Act, the accused is expressly deprived of the statutory right to claim trial by jury. Since the *Practise* went to press, however, this Statute has been the subject of much hostile criticism upon this and other points. It has now been amended. In the labour of revision Mr. Atkinson has again enjoyed the assistance of Mr. Frank Richards, of Leeds.

**Twenty-sixth Edition.** *Paterson's Licensing Acts.* By G. R. Hn.L, M.A., assisted by S. E. MAJOR, Junr. London: Butterworth & Co. 1915.

In the present edition, the fourth to the learned Author's credit, general assistance has been given by Mr. S. E. Major, Clerk to the Licensing J.J. of Barrow-in-Furness. Mr. Major has also revised and increased the number of the forms in the Appendix. Several alterations designed to render the book more useful to practitioners have been made. The chapters in Part I, dealing with licences for theatres, music and dancing, cinematograph exhibitions and billiard-rooms, have been remodelled so as to bring them into conformity with the general scheme of the book. The various Statutes relating to these licences, together with full notes, are to be found in Part II. These provisions of Statutes regulating performances by children at public entertainments have been added.

The chapter on "Clubs" has been considerably amplified and largely re-written, whilst that containing decisions upon miscellaneous points of law connected with licensed premises has been rearranged under sub-heads so as to facilitate reference. The historical matter relating to the Act of 1910 has been compressed into one chapter, and now forms a chronological summary of the Licensing law from 1828. During the year there has been an increased number of decisions upon points of Licensing law, and these are duly noted in the text. Attention may be particularly directed to *Melby v.*

*Trade, as to managers holding licences; Commissioners of Customs and Excise v. Curtis, as to monopoly value when a full licence is granted to a beerhouse; Radford v. Williams, as to "permitting drunkenness"; and Melford v. Edwards, as to bogus clubs.* The relevant provisions of the War Emergency Statutes are prefixed to the book. In the able hands of Mr. Hill this standard work continues steadily to improve, and this is effected without any material increase of bulk, a sure indication of capable editorship.

*The Finance (1909-10) Act 1910. Cases and Amendments.* By F. M. RUSSELL DAVIES, M.A. London: Sweet & Maxwell, 1914.—The object of the learned Author of this book is to present in a convenient form the reported decisions upon and subsequent statutory amendments to the Finance Act 1910. With the position of Lumson's case, where the Lords were equally divided, Mr. Davies is naturally dissatisfied. The decision of the Court of Appeal, which consequently held good, he considers to be wrong. Mr. Davies's critical and explanatory notes are very much to the point, and the only fault we have to find is that they are much too brief.

*Inland Revenue Affidavits.* By T. O. VOYSEY. London: Stevens & Haynes, 1915.—This little book is intended to show practitioners how to prepare and deliver an Inland Revenue Affidavit for the payment of Estate Duty upon obtaining a grant of probate or letters of administration. Detailed instructions are arranged in alphabetical order. Mr. Voysey is employed in the Estate Duty Office at Somerset House, and his statements may therefore be accepted with confidence.

*Butterworth's Workmen's Compensation Cases, Vol. VII (New Series).* By Judge RUEGG, K.C., and DOUGLAS KNOCKER. Assisted by ENGAR T. DALE. London: Butterworth & Co. 1914.—The only difference in this volume from its immediate predecessor is its increased bulk due to the great number of Appeals decided in the course of the year. The former arrangement is preserved, the Reports being preceded by a Digest of all the cases reported in this volume arranged in the order of the sections of the Act of 1906. To the report of every case reported elsewhere references are added. The cases are reported with the same care and accuracy as formerly by members of the Bar mentioned in the Preface, and this series will compare favourably with that of any other Reports.

**Third Edition. Procedure at Meetings.** By ALBERT CREW. London : Jordan & Sons. 1915. So important to the public is the subject of this book that it is well to recall its scope. It contains a concise and clear statement of the law relating to the conduct and procedure at public and company meetings, with the sections of relevant Statutes such as those relating to the preservation of order ; full notes and definitions of technical terms ; the rights of theatre-goers ; admission of the press ; the law relating to free speech ; blasphemy ; notes on statutory meetings ; and forms of notices of meetings, agenda papers, and minutes, together with the decisions of the Courts affecting meetings down to October, 1914. These decisions, since the publication of the second edition, are both numerous and important, and are duly noted in their place. A new feature is a chapter entitled "The Art of Public Speaking," by Mr. George Goodes, the well-known lecturer in Elocution.

Books received, reviews of which have been held over owing to want of space :—Oppenheim's *Papers of J. Westlake on Public International Law*; Huberich and Nicol Speyer's *German Legislation for the Occupied Territories of Belgium*; Goodby's *Commentary on Egyptian Criminal Law*; Robson's *Transfers and Injuries by Animals*; Aggs' *Handbook on Bankruptcy*; Stone's *Justice's Manual*; Brissaud's *History of French Public Law*; Sanders' *Criminal Justice Administration Act 1911*; Pecchio's *The Relation of International Law to the Law of England and of the United States*; McEviley's *Principles of Roman Law*; *Railway and Canal Cases*, Vol. XV; Disney's *Carriage by Railway*; Paty and Morgan's *War: Its Conduct and Legal Results*; Poetry Man's *Own Lawyer*; Mews' *Annual Digest*; Chitty's *Annual Statutes*; Butterworth's *Twentieth Century Statutes*; Butterworth's *Yearly Digest*; Archbold's *Lunacy*; Williams' *Bankruptcy*; Glaister's *Medical Jurisprudence*; Jordan's *Company Law*; Snell's *Principles of Equity*.

Other Publications received :—*Naval and Military Despatches relating to the War* (H.M. Stationery Office); Kürün's *Grundzüge des Englich-Amerikanischen Privat und Prozeßrechts* (Art. Institut Orell Füssli, Zürich); *Decisions of United States Courts on Copyright, 1913* i.e. and *Report of Register of Copyrights* (Library of Congress, Washington); *Les Refugés Belges face aux Allemands* (B. H. Blackwell, Oxford); *The Political Quarterly* for February (Oxford University Press); *Business*, by A. Betts.

The *Law Abroad and Review* receives or exchanges with the following amongst other publications.—*Juridical Review*, *Law Times*, *Law Journals*, *Justice of the Peace*, *Law Quarterly Review*, *Irish Law Times*, *Australian Law Times*, *Canada Law Journal*, *Canada Law Times*, *Chicago Legal News*, *American Law Review*, *Harvard Law Review*, *Case and Comment*, *Green Bag*, *Madras Law Journal*, *Calcutta Weekly Notes*, *Law Notes*, *Law Students' Journal*, *Bombay Law Reporter*, *Indian Review*, *Kathiarwar Law Reports*, *The Lawyer* (India), *South African Law Journal*.

# THE LAW MAGAZINE AND REVIEW.

No. CCCLXXVII.—AUGUST, 1915.

## I.—THE COMMISSION OF LIEUTENANCY IN THE COUNTIES: ITS HISTORY AND FUNCTIONS.

THE office, if not the name, of lord-lieutenant may be traced to a very remote antiquity. With the Barbarian invasion of the empire the Roman province disappeared as a unit of administration. During the early part of the 5th century, under pressure from the enemy, the Roman Government established in many of the cities military officers with the title of *comes viriatus*. For instance, Auspicius, Bishop of Toul, writes to the *comes Trevorum* about the year 457 and a *comes civitatis* at Marseilles is mentioned in 475. Powerless to govern vast territories, such as a Roman province, the Barbarians seized on the Roman *civitas* as the unit of administration. Whether the Roman military count enjoyed with his military functions civil powers, has not yet been satisfactorily proved. Probably he did, since, in Gaul, for instance, the Merovingian count who had stepped into the shoes of the Roman *comes* united in himself both civil and military powers and exercised his judicial authority through his deputies, the *thunginus* and the *centenarius*.<sup>1</sup>

<sup>1</sup> Fustel de Coulangé declares "en réalité ces comtes mérovingiens, mi partie Francs, mi-partie Gaulois, étaient les successeurs des comtes que l'empire avait établis dans chaque ville au 5<sup>e</sup> siècle."

The Roman *civitas*, it must be noted, included within its area, not only the territory within its walls, but also a large tract of land outside, known as the *territorium*. In adopting the Roman *civitas* as the unit of administration, the Barbarians did so with this difference. In many instances they split up the *territorium* into one or more counties. Thus, in Gaul, the 120 imperial *civitates* became 900 Carolingian counties. The policy adopted by the Anglo-Saxons in Roman Britain was, we have every reason to believe, similar to that of the Barbarians on the Continent. As a rule the Anglo-Saxon *scire* succeeded the Roman *civitas*. London formed the principal exception. Its *territorium* outside the walls, with the exception of the liberties, was absorbed by the surrounding counties. So, too, the Roman *comes civitatis* was replaced by the Anglo-Saxon *caldorman*, who later developed into the earl. In the early days of the Barbarian conquests, both in Gaul and in Britain, popular justice was administered in the hundred courts, the county assembly—*mellus-witenagemot*—so far as it met for judicial business, dealing only with disputes between the king's thegns. In these times the *caldorman* exercised his judicial functions through two deputies, the one called *caldormannes gingra* or *principis junior*, who presided\* in the hundred courts for the trial of disputes between Anglo-Saxons, and the other, the *wealh-gerefa* or *centenarius*, who presided for the trial of disputes between the Romano-British. This distinction lasted until the Danish invasions welded the two races into one by the necessity of resisting a common danger. With this coalescence, the county court assumed greater importance. The Romano-British landowners forced their way as assessors upon the bench. They formed part of the *gewittnesse* with the scir-thegns. The county court became open and competent to both Roman and Saxon. In this court the *caldorman*, and after the conversion of the Anglo-Saxons to

Christianity, the bishop with him, presided. In his absence, the caldorman was represented by his deputy, *vici-comes*—*scir-gerefa* or sheriff, i.e., the reeve of the scire. With the growth of the monarchy the ealdorman had developed into the earl, a great territorial magnate responsible for the administration of one or more scires. In some instances he was, in fact, a deposed king, and signed as *sub-regulus*. After the Danish invasions the Anglo-Saxon caldorman gave place to the Danish *curl*, who ranked with the Continental *dux*, and was frequently so called.

The Roman *tributum*, originally a war tax, became a permanent tax upon land. It was continued in Anglo-Saxon Britain under the names of *land-gafol* and *haw-gafol*—land-tax and house-tax. In addition to this tax, for which was later substituted the danegeld, were three further burdens upon land, known to the Anglo-Saxons collectively as *threo neude*, and to the Romano-British as *trinoda necessitas*. These were the *burhbot*, the *bryegbot*, and the *fyrd*. Under the first the landowner was liable for the maintenance of the walls of the chief town of the county in proportion to his holding within the county. Under the second, for the maintenance of the county bridges and highroads; and under the third, for the provision of free men, living upon his estate, in proportion to its hideage, for the defence of the kingdom. The *fyrd* of each county was distinct and was under the control of the ealdorman of the county.

For his trouble and expenditure in collection of these taxes and of the imposition of these burdens, the caldorman was allowed to retain one-third of the receipts, known as the earl's third penny.

The ealdorman was also responsible for the King's peace within the county. This was secured by the police system of the hundred and tithing, which bears too close a resemblance to the Roman *milites stationarii*, detailed for the

supervision of the *centenae* and *decaniae* within each *civitas* to be a matter of mere coincidence. Under the Anglo-Saxon system of *frithbor*, every free man was required to find a personal surety for his good conduct or become a member of a hundred and a tithing. Just as the Roman *decanus* presided over ten men, of whom he was one, so the Anglo-Saxon *headborough* or constable was responsible for the production of the other nine men who formed his tithing. Thus, for the punishment of peace-breakers, their pursuit, arrest and safe-keeping the *hundredes-ealdor* and the *headborough* were made personally responsible. Offences against the peace were tried in the hundred court, where the sheriff, or in his absence, the *hundredes-ealdor* presided. Once a year attendance at the hundred court of all the tithing men was required that all might be registered. This attendance was known as the sheriff's tourn. For the purposes of arraying the tribe in arms, this division into hundreds and tithings is said to have prevailed amongst all Germanic peoples. The same organisation was used by the Anglo-Saxon monarchs for military as for legal purposes.

Naturally, the ealdorman could not attend personally to the discharge of all the duties imposed. When the military array had been summoned, it was his deputy, the sheriff, who collected the fines for non-appearance and the tax for the equipment of the soldiers—*tribula expeditionalia*—the *scorpi* to *fyrdshire*—in which we have no difficulty in recognising the Roman *militaris vestis*. These soldiers, when delay would be dangerous, the sheriff might lead against invading pirates or in pursuit of thieves and cattle-lifters.

This three-fold combination of the highest legal, police and military functions within the county in the person of the ealdorman, rendered his position one of the highest dignity and rank in the kingdom. And when, for military purposes,

several counties were placed under one ealdorman, his position was greatly enhanced. This idea was carried still further by Cnut, who divided the counties into four provinces, at the head of each of which an earl was placed. Although we subsequently read of ealdormen and earls as synonymous, the title of the latter supplanted that of the former. After 1048, alderman is only retained for lesser dignitaries in the cities.

This enhancement of the office of ealdorman was followed by that of the sheriff. As the ealdorman, and later the earl, became more concerned with military affairs, legal and police functions were left more and more to the sheriff. Moreover, the latter had become an official upon whom the king could place more reliance than upon a powerful local magnate. Whatever the reason, by the end of the Anglo-Saxon period the holding of the county court by the sheriff was regarded as a time-honoured custom.

Upon the Norman conquest the office of earl underwent drastic changes. His administrative functions ceased. His only connection with the county from which he derived his name was the receipt of the earl's penny—*tertius denarius*—for the support of his dignity, which still survived. But even this payment was only conferred by grace and not by any right of office. Occasionally an earl was appointed sheriff in his own county, but it became too dangerous to the royal interest to entrust such power to the nobility. The Norman *vice-comes*, still popularly known as the sheriff, becomes the real governor of the county as the royal representative. In the county court he now appears alone as the presiding judge, ecclesiastical causes having been relegated by the Conqueror to separate courts Christian. As police magistrate of the Crown, he is responsible for the view of frank pledge, the maintenance of the peace, the arrest of peace-breakers, and their pursuit, if necessary, with the "hue and cry" of the whole county. As bailiff of the

royal demesnes, he collected all dues within the county payable to the Crown, appearing twice a year at the Exchequer to render his account. As the King's military representative, he was responsible for the new feudal organisation which was imposed by William upon his vassals. The old system did not pass away immediately. The thegn, now known as knight, was still bound to render military service to the King as head of the State. By the new system of tenure by knight service, the duty of military service was the substantive duty due from the tenant-in-chief to his lord. This system was not complete before the reign of Henry II, when, upon each knight's fee, the obligation was imposed to furnish a fully-armed horseman to serve, at his own expense, for forty days in the year.

Whatever rights the Anglo-Saxon kings possessed, the Norman and Angevin rulers were careful to retain. Thus they never abandoned their right to summon the national forces of the shires. The English *fyrd* was continued alongside the Norman feudal *aristay*, and the King made use of either or both as suited his purpose. By the introduction of *scutage*—a pecuniary commutation for personal service—to the combination of feudal and national troops was added a mercenary force.

By the Assize of Arms of 1181 (27 Henry II) the national militia was reorganised. Each owner of a knight's fee was required to possess a suit of armour, helmet, shield and lance. Every knight was required to have as many suits of armour as he had knights' fees. Every freeholder worth sixteen marks in moveables or rents was also to possess a suit of armour, etc. Every freeholder worth ten marks was to have a breastplate, helmet and lance. All burghers and other freeholders, a studded jerkin, helmet and lance. All were to swear the oath of allegiance and to keep their weapons ever in readiness for the King's service. For the summoning and equipment of both these forces the

sheriff was responsible. Within the county, and sometimes outside its boundaries, he was the commander-in-chief. With these wide powers, judicial, executive, financial, and military, the sheriff became for some centuries the most important officer in the county. In view of his important judicial functions, it is said that at one time every sheriff was required to be a serjeant-at-law, an office *per se* of great dignity.

As a rule the armed vassals of the tenants-in-chief served under their own lords, whilst the minor tenants-in-chief and the freemen sworn under the Assize of Arms served under the sheriff. In the 13th century several changes in the military organisation took place. In 1205 the sheriffs were warned that every nine knights were to furnish a tenth, and the whole effective force of the country to be incorporated and sworn under an organisation of constables for national defence. In 1223 the sheriffs were directed to impose the oath on those who had been *jurati ad arma* under John, and in 1231 they were ordered to furnish contingents of men-at-arms to be provided by the men of the county, sworn under the Assize of Arms. Stringent provisions for increasing the efficiency of the force were issued in 1252. All *jurati ad arma* were required to provide themselves with arms and to place themselves under the command of the civil authorities; in the cities and boroughs under the mayor and bailiffs; in each township under the constable; the whole under the chief constable of the hundred. All were required to join the "hue and cry." By the Statute of Winchester, 1285, the police and military aspects were further developed. The various attempts made by Edward I and Edward II to compel the county force to serve abroad resulted in the statute of 1 Edward III, c. 5, which provided that "no man from henceforth should be charged to arm himself otherwise than he was wont in the time of the King's progenitors; and that no man be compelled to go out of his shire but when

necessity requireth and sudden coming of strange enemies into the realm; and thus it shall be done as hath been used in times past for the defence of the realm."

To have called up the whole nation in arms was, of course, always impossible.

The *posse comitatus* included the whole adult population. In practice, either the *posse comitatus* of those counties nearest the scene of conflict only was summoned, or a fixed proportion, e.g., four, six or eight men from each township, armed at the discretion of the sheriff and provided with forty days' provisions at the expense of their own localities. This practice was developed by Edward I by means of Commissions of Array. Writs were issued to individuals commissioning them to *clect*, that is, to press or pick a fixed number of men from one or more counties. The forces thus raised were paid by the King and, with the county force, placed under the command of a *capitaneus* or *cheveteigne* in each county. The latter first appears in 1276, when Roger Mortimer was made captain for Salop, Stafford and Hereford, and William Beauchamp for Chester and Lancashire. In 1282 William le Butiller is commissioned to raise 1,000 men in Lancashire, and numerous other commissions were issued for the counties of Derby, Nottingham, Stafford, Salop, Hereford and the Marches. In 1287 the Earl of Gloucester is appointed *capitaneus expeditonis regis in partibus de Brecknock*, and in 1296 Robert de la Ferete and William of Carlisle *capitanei et custodes pacis* for Cumberland. *Capitanei munitionis* are appointed in Northumberland and Cumberland and *capitanei custodiae partium Marchiae* in the same year. Finally, in 1298, these commissioners are styled *Cheveteignes des gentz d'Armes*. William Latimer, for instance, is appointed "notre lieutenant e souverein cheveteine de vous e toutes les gentz de armes a cheval e a pie" for the northern counties, with a captain under him for each county. These officers, says

Bishop Stubbs, "must have been the prototypes of the later lord-lieutenant."<sup>1</sup>

In spite of the prohibition of compulsory service abroad contained in 1 Edward III, c. 5, and repeated in 25 Edward III, c. 5, and in 4 Henry IV, c. 13, such special levies, to be maintained at the charge of the King, were recognised by Parliament in the last-mentioned statute. In practice, however, the troops thus raised by Edward III were not as a rule paid direct by the King. This monarch usually raised his armies for foreign service by a system of indentures, whereby he contracted with soldiers of fortune and others to provide a fixed number of men with a fixed scale of pay, the men being raised, organised, armed and led by the contractor.

During the Wars of the Roses Commissions of Array were from time to time issued by both parties.

These were no less unpopular than in previous times. Their issue by the Lancastrians, after the Battle of Ludlow and return to power of Henry VI, is said to have been one of the causes which drove the people of Kent to flock to the Yorkists. It is true that these dynastic contests were waged for the most part by both sides, with the personal followers of their respective adherents. By the system of retainers and giving liveries, the magnates kept in their service bodies of men trained to arms. At the same time, the Yorkists, when in power, did not hesitate to make use of Commissioners of Array. After the death of Richard, Duke of York, on the field of Wakefield, a Commission of Array was issued to his son Edward in Henry's name on February 12th, 1461, in the following terms:—

*Assignavimus nos et vobis plenam, Tenore Praesentium,  
Committimus, Potestatem ad Advocandum vobis omnes et  
singulos Ligeos et subditos nostros Villas Bristolias, ac Comita-  
tum nostrorum Staffordiae, Salopie Mercordiae, Gloucestriae*

<sup>1</sup> *Const. Hist.*, Vol. II, 309.

*Wigorniae Somersetiae et Dorsetiae et eorum cuiuslibet (cujus cunque Status Gradus seu Conditionis fuerint) de quibus velis melius expedire videbitur, ac profisciendum vobiscum adversus et contra praefatos Praesumptores atque Rebelles nostros, ac ad Assistentiam et Auxilium suum vobis Dandum et Impendendum, ac ad eorum Praesumptionem, Temeritatem et Audaciam Reprimendum, Coherendum et Castigandum, ipsosque subjugandum, Arrestandum, Capiendum et Justiciandum, et, si vobis Resistendum duxerint adversus eosdem Praesumptores, si Rex exegerit tanquam Hostes et Rebelles nostros, procedendum et eosdem Expugnandum.*

*Et ad omnia alia quae vobis circa Praemissa seu aliquod eorumdem videbuntur necessaria seu opportuna, de tempore in tempus, Faciendum Exercendum et Executendum.*

For carrying out these instructions, all sheriffs and their officials were directed to give every assistance and aid in their power.<sup>1</sup>

A Commission of Array was issued by Edward himself, June 2nd, 1463, to Richard, Earl of Warwick, in similar terms. In addition to these special Commissions, Edward, by royal proclamation, issued to the sheriffs March 6th, 1461, September, 1462, and May 11th, 1464, ordered all men between the age of 16 and 60 to be arrayed and to hold themselves in readiness to wait upon him when they should be summoned. Edward also availed himself of the contract system. By an Indenture of War between the King and Robert Donne, "Robert is reigned and behest towardis the same our soveraigne lord to do hym service of warre . . . . for an hool ycre . . . . with x archers . . . . takyng wagis for hymself of xijd. by the day and vjd. by the daye by moyen of Reward and for everiche of the saide archers vjd. by the day."<sup>2</sup> Lords Audley and Duras received 4s. a day for themselves and 6d. a day for each of their 2,000 archers.<sup>3</sup>

<sup>1</sup> Rymer, *Fœdera*, v. 103, 122.

<sup>2</sup> Exchequer Accounts, Q. R. Army 72/1. Cited by A. Abram, *Social England in the Fifteenth Century*.

<sup>3</sup> Rymer, *Fœdera*, v. 35, 30th March, 1474.

A special Commission of Array, dated July 3rd, 1468, was directed to Humphry Stafford and other knights to raise men-at-arms, hoblers, as well as archers within the county of Cornwall.

When Edward was expecting the landing of Clarence and the Earl of Warwick on the Kentish coast, he writes, on September 6th, 1470, to one William Swan, of Eton, gentleman, charging him to "airiedie" himself "with all the felship he could make" to resist the invasion in Kent.<sup>1</sup> On November 16th he also issued a Commission of Array to the Dukes of Norfolk and Suffolk and Earl Rivers, in which the form is almost the same as in that of February 12th, 1461. This was followed by a Commission of Array to Fulk Bourcheer de Fitzwarren and other knights for the county of Devon on March 16th, 1470. With Henry once more on the throne, Commissions of Array were issued to the Duke of Clarence, the Earls of Warwick and Oxford and Sir John Scrope, for the counties of Cambridge, Huntingdon, Norfolk, Suffolk, Essex and Hertford, on December 28th, 1470; to the Duke of Clarence and the Earls of Pembroke and Warwick for Wales and the Marches on January 30th, 1471; to Edward, Prince of Wales, for the whole kingdom on March 27th, 1471.<sup>2</sup>

Finally, on March 12th, 1480, Edward issued a Commission of Array to his brother Richard, as his *locum tenens generalis*, to repel the Scottish invasion and giving him power to array the borders and the adjacent counties. Here, apparently, we first meet with the title of *lieutenant*.<sup>3</sup> In addition to Commissions of Array issued to the sheriffs, Henry VII also directed special commissions in the same form as his predecessors to the Earl of Surrey, the Bishop of Durham, and other magnates on the Scottish border and the adjacent counties on March 22nd, 1495.<sup>4</sup>

<sup>1</sup> Paston Letters, 653.

<sup>2</sup> Rymer, *Fœdera*, i. 173, 183, 195.

<sup>3</sup> *Ibid.*, v. 104.

<sup>4</sup> *Ibid.*, v. 78.

To the same Earl of Surrey, on August 6th, 1512, Henry VIII issued a Commission of Array for the counties of York, Northumberland, Cumberland, Westmorland and Lancaster. The operative words of the commission do not differ materially from those used in the past. The following is the translation :—

"The King, to our well-beloved cousin Thomas Earl of Surrey, Treasurer and Marshall of England, Greeting.

"Know ye that We, fully assured of your fealty, wisdom, vigour, industry, and diligence, experience and integrity, have assigned you, and by the tenor of these presents We give and confer upon you full power and authority to summon and collect, all and singular, our lieges and subjects fit for war within the counties of York, Northumberland, Cumberland, Westmorland and Lancaster, residing within the liberties as without for the purpose of arraying and trying them and according to their rank and ability cause them to be well and properly armed and weaponed, and in your ripe discretion from time to time, in the more suitable places, take and supervise musters and displays.

"Moreover We give you full power to have or cause to be had of our lieges and subjects when arrayed, tried, and armed, as many men-at-arms, armourers, and archers, and other armed men, both horse and foot, as may be necessary for the resistance, suppression, and defeat of the Scots, and in this campaign you are the Regent and Governor. And We command you to carefully attend to our instructions and cause them to be effectually carried out.

"And We give our strict orders to all and several, our dukes, earls, barons, knights, justices, mayors, sheriffs, bailiffs, constables, lieutenants, officers, ministers, sailors, soldiers, and all other our said lieges and subjects and all under our faith and allegiance who have any interest in this part by the tenor of these presents to attend to your instructions and give you their aid and assistance as fully and as thoroughly as if they were aiding and assisting Us and as if We had been personally present. We also will that you as well as all and singular our said lieges and subjects, gathered by you in the manner aforesaid shall be wholly free by these premises from all

manner of forfeitures, damages and penalties to which, by virtue of any Statutes, Acts, or proclamations to the contrary formerly made and published by reason of the premises you or they might be liable."<sup>1</sup>

The following year a Commission of Array, in almost precisely the same terms, was issued to Sir Thomas Lovell for the counties of Nottingham, Derby, Warwick, Leicester, Stafford, Rutland, Northampton and Lincoln.<sup>2</sup> In 1544, to meet the trouble with Scotland, a Commission of Array with still wider powers, was issued to the Earl of Shrewsbury, as the King's Lieutenant and Captain-General for the counties of York, Durham, Cumberland, Westmorland, Kendall, Northumberland, Lancaster, Chester, Nottingham, Derby, Salop and Stafford, the City of York, Kingston-upon-Hull and Newcastle-upon-Tyne. Similar commissions were issued to a number of noblemen and knights, either jointly or severally, in 1545. In those directed to the Earl of Hertford and to the Duke of Norfolk each is described as Lieutenant and Captain-General.<sup>3</sup>

Commissions were also issued by Edward VI, as we learn from the commission addressed by Lady Jane Gray as Queen to the Marquis of Northampton, who had been appointed lieutenant of the counties of Surrey, Northampton, Bedford and Berks by Edward. He is instructed by Lady Jane "to execute everything and things as her lieutenant within all places according to the tenor of the commission addressed" to him by Edward.<sup>4</sup>

In the first year of Mary Tudor we have for the first time a Commission of Array in the English tongue. It will be seen that the old form is closely followed:—

"Mary, by the Grace of God, etc., to our right trustie and well-beloved William Graye, Knight, Lord Graye of Wilton, Greeting.

<sup>1</sup> Rymer, *Fœdera*, vi. 36. <sup>2</sup> *Ibid.* vi. 49. Sept. 3, 1513. <sup>3</sup> *Ibid.* vi. 127, 129.

<sup>4</sup> Ellis, *Letters*, Vol. II, 183 (July 11, 1553). For other commissions issued by Lady Jane, see MS. Lansd. B.M. 1236, fo. 24.

"Know ye that, for the singuler confidence We have in you and also for the great trust We likewise have in your approved fidelitie wisdom and discretion, We have assigned and appoynted you and by these presents We give full power and auctoritie unto you to levye gather and call togither of our loving subjects inhabiting and dwelling within our counties of Midd. Kent and in our Citie of London or in any of them as well within Liberties as without, the nombre of three hundredth and fyftie footmen and fiftie horsemen having launcys mete and apt for the warres of our service to be done, and theym to trye arraye and put in redynes and theym also and every of them after their habilitie degrees and faculties well and sufficiently weaponed and to take the musters of them from time to time in placys most mete for that purpose after your good discretion, and also the same nombre of our subjects as well horsemen as footmen so arrayed tried and armed to leade brige carye or conducte to our castle and towne of Gynes beyonde the see;

"And further by these presentes We do give unto you full power and auctoritie to do fulfill and execute all and singuler other thinges which shall be requisite for the leavyeng leadyng and government of the said nombre of our subjects so by you in form aforesaid levyyed and to be ledd; wherfor We will and command you that ye withe all diligence do execute the premisses with effect:

"And further We wol and command all and singuler our faithful subjects within our said counties and Citye to whom it shall apperteyne that they and every of them from tyme to tyme shall be attendance to ayeding assisting and counsailling and helping you in the execution hereof, as they and every of them tender our pleasure and will aunswore for the contrarye at their uttermoste peryll."<sup>1</sup>

I have now shown, and for the first time, that these special Commissions of Array have been issued by the Crown in unbroken succession from the reign of Edward I to that of Henry VIII. Originally they were supposed to be issued with the assent of Parliament but they were not made

<sup>1</sup> Rymer, *Foedera*, vi. 4. July 31, 1553.

statutory, and then only by implication, till 1549, when, by 3 & 4 Edw. VI, c. 5, s. 7, it was declared that—

“it should be lawful to any person or persons having the King's commission or letters from his highness or privy council to raise and assemble the King's loving subjects in manner of war to be arrayed in great number as he or they shall think meet or able to the intent by violence and strength to suppress, apprehend and take the said persons that so shall be unlawfully assembled.”

In this statute also, lieutenants of counties are first mentioned in an Act of Parliament. Sect. 13 provides:—“That if the King shall by his letters patent make any *lyvetenante* in any county or counties of this realm for the suppressing of any commotion rebellion or unlawful assembly that then as well all justices of peace of every such county and the sheriff and sheriffs of the same as all mayors bailiffs and other head officers and all inhabitants and subjects of any county city borough or town corporate within any such county shall upon the declaration of the said letters patent and request made be bound to give attendance upon the same *lyvetenante* to suppress any commotion rebellion or unlawful assembly unless he or they being so required have any reasonable excuse for his not attendance upon pain of imprisonment for one whole year.”

In a statute of Philip and Mary, relating to musters for the defence of the realm, reference is made to the *lieutenant*, *warden*, or other person authorised by the Crown to deal with this matter.<sup>1</sup> In sect. 4 these officials are called *lord-lieutenant* and *lord-warden* respectively. These commissions had now become so much a matter of course that Hollingshead was able to write of them in the middle of Elizabeth's reign, “over each of these shires in time of necessity is a several lieutenant chosen under the Prince, who, being a

<sup>1</sup> 4 & 5 Ph. & M., c. 3.

problem of calling, hath almost regal authority over the same shire for the time being in many cases which do concern his office ; otherwise it is governed by the sheriff.<sup>1</sup> But the change was not merely nominal. In the hands of the ealdorman the *fyrd* had been a force strictly for home defence. It was led under its local and popular officers. The Norman sheriff was, it is true, a royal officer, but his powers were clearly defined. The array was still a force for home defence. By means of these special Commissions of Array to the magnates, the attempt was made to convert the national militia into a standing army under the Crown, liable for service at home or abroad. How unpopular these commissions were we have seen during the Wars of the Roses. They were no less so under the Tudors, but Parliament was too weak to question the prerogative of the Crown, and not only the statutes already mentioned, but those of Elizabeth,<sup>2</sup> tacitly admitted the right of the Crown to raise troops in this fashion. In the Elizabethan statutes for the relief of soldiers and mariners, they are referred to as "having been pressed." Impressionment was now regarded as one of the royal prerogatives.

We have seen that in several of these commissions, civil as well as military powers were conferred. Under the Tudors, the baronial nobility gave place to a new class of men. Into their hands fell the civil administration of the county. The new county magnates monopolised the commission of the peace, and from their ranks the Tudors filled the depleted seats in the Upper House in a certain proportion to the number of counties. Thus, a seat in the House of Lords, a commission as *custos rotulorum* and lieutenant of the militia generally coincided. Thus the old office of ealdorman or earl was revived, and the sheriff once more fell back to a second place in the county, shorn both of his chief judicial and military functions. To-day the office of

<sup>1</sup> *Chronicles I*, 155.

<sup>2</sup> 38 Eliz., c. 4; 39 Eliz., c. 21; 43 Eliz., c. 3.

High Sheriff is purely ornamental. The country gentleman who is now appointed, frequently much against his will, is called upon to perform during his year of office a few disconnected and formal duties, nearly all of which may be performed by an under-sheriff, who is each year re-appointed as a matter of course by the new sheriff. He acts as returning officer at Parliamentary elections, he receives the judges on circuit, he summons jurors, and executes judgments both civil and criminal. He is still entitled to preside in the county court and to call out the *posse comitatus*. These rights, it is needless to say, are no longer exercised.

Very naturally, questions relating to the militia formed subjects of controversy between the Stuarts and the people. Courts-martial, by which the lord-lieutenants punished both civilians and soldiers, were declared illegal by the Petition of Right, 1628. The last Statute to which Charles I gave his assent, on February 13th, 1642, was the Impressment Act for raising an army in Ireland, with the clause forbidding him to compel men to go out of their counties without permission from Parliament. The final struggle between King and Parliament took place over the appointment of the lord-lieutenants. By the Militia Ordinance, passed by both Houses March 5th, Parliament endeavoured to gain control of the militia by placing their own nominees in the commission of the counties. Charles countered with his Proclamation of May 27th, condemning the Militia Ordinance as illegal. One of the nineteen propositions sent by the two Houses, on June 1st, to Charles at York, requested him to accept their "ordering of the militia" until the matter could be settled by Bill. This appeal meeting with no response, the Houses issued the Declaration in Defence of the Militia Ordinance on June 6th, challenging the King's prerogative and commanding all concerned to act upon the warrants from the lieutenants, deputy-lieutenants, captains,

and other officers of the trained bands, according to the said Ordinance. To this Charles replied in his Letter to the Commissioners of Array to Leicestershire, of June 12th, in which he maintained his right "to order and govern the militia of the kingdom" as his predecessors had. This was followed by the attempt of the King's Commissioners to oust the Parliamentarian lord-lieutenant, the Earl of Stamford, from the county of Leicester. The answer of Parliament was the resolution to raise an army with Essex as general.

By the Act of 1662 for "ordering of the forces in the several counties,"<sup>1</sup> the sole and supreme power, government and disposition of the militia, and of all the forces by sea and land, were declared to be the undoubted right of the King, who might issue such commissions of lieutenancy in the counties for the purpose of calling together and arming and arraying the people as he should think fit. Such persons so arrayed were to be formed into troops and regiments. Full power was conferred upon the lieutenants to give commissions to such persons as they thought fit to be colonels, majors, captains and other commissioned officers, and to submit the names of such persons as they thought suitable to be deputy-lieutenants to His Majesty for approval and appointment.

In the reign of Elizabeth, not only the lord-lieutenant but his deputy-lieutenants were nominated by the Crown. In 1595 the Earl of Pembroke was lieutenant for the counties of Wales, and several of his deputies in some of the counties having died, Elizabeth directed the lord-keeper to nominate others in their place.<sup>2</sup>

By this statute the Crown, through its nominees, was once more in complete control of the national militia. With the expulsion of the Stuarts, however, the royal prerogative was again challenged. By the Bill of Rights "The raising or keeping a standing army within the

<sup>1</sup> 14 Car. II, c. 3.

<sup>2</sup> Rymer, *Foedera*, vii, 168.

kingdom in time of peace, unless it be with the consent of Parliament," was declared illegal. This principle was crystallised in the Mutiny Act of 1689,<sup>1</sup> the parent of the annual Army Acts under which the regular army is now governed.

In 1757, in consequence of the inefficiency into which the militia had fallen, an Act<sup>2</sup> was passed for its reorganisation upon lines which, with some modifications, continued until 1871. Up to this date the lord-lieutenant was in command of the militia within his county, responsible for its discipline and efficiency, and the appointment and dismissal of its officers. Other auxiliary forces, such as the yeomanry and the volunteers, were also under his command. By the Army Regulation Act 1871,<sup>3</sup> however, all this was changed. All their powers were re-vested in the Crown with the exception of the right to appoint deputy-lieutenants and their jurisdiction and powers in relation to raising of the militia by ballot. By the Militia Act 1882,<sup>4</sup> the first appointments to the lowest rank of militia officers were given on their recommendations.<sup>5</sup>

Under this Act the Crown must appoint a lieutenant for every county, and the lieutenant so appointed *must* appoint such persons as he thinks fit living within the county and properly qualified as his deputy-lieutenants. These *must* number twenty at least, and if so many duly qualified cannot be found, then all the duly qualified persons living in the county must be appointed deputy-lieutenants. Their names must first be submitted to the Crown, and no commission must be granted until the lord-lieutenant has been informed by a Secretary of State that the King does not disapprove of such appointment. Deputy-lieutenants may be removed at the King's pleasure, and in such case the lord-lieutenant must appoint others in their stead, and a return of all such displacements and appointments must

<sup>1</sup> 1 Will & Mar., c. 5.

<sup>2</sup> 30 Geo. II, c. 25.

<sup>3</sup> 34 & 35 Vict., c. 86.

<sup>4</sup> 45 & 46 Vict., c. 49.

<sup>5</sup> Sect. 6.

"be annually laid before Parliament, made up to the thirty-first day of December, within ten days after Parliament meets."

The commission of a deputy-lieutenant is not vacated by the cessation of office of the lord-lieutenant who granted it.

In the absence or inability to act of the lord-lieutenant, the King may authorise three deputy-lieutenants to act in his place.

The lord-lieutenant may, with the approbation of the Crown, appoint any deputy-lieutenant to act for him as his vice-lieutenant during his absence from the county, sickness or inability to act, and such vice-lieutenant is invested with all the powers of the lord-lieutenant.

The following are the qualifications of deputy-lieutenants:-

(A) He shall be a peer of the realm or the heir-apparent of such a peer, and have a place of residence within the county for which he is appointed; or

(B) He shall be in possession for his own benefit of an estate for the life of himself or another, or of some greater estate, in land in the United Kingdom, of the yearly value of not less than two hundred pounds; or

(C) He shall be the heir-apparent of some person who is in possession for his own benefit of such an estate as above mentioned; or

(D) He shall be possessed or entitled, at law or in equity, in possession for his own benefit, for the life of himself or another or for some greater interest, of or to a clear yearly income arising from personal estate within the United Kingdom of not less amount than the yearly value of an estate in land above mentioned; and the clear yearly income arising from any such personal estate shall be admitted in whole or in part of a qualification from the possession of an estate in land."

A deputy-lieutenant not qualified as a peer or heir-apparent of a peer must, before acting, deliver to the clerk of general meetings of lieutenancy a specific description under his signature of his qualification, with full particulars of his estate in land or of his heirship to the same. Such description must then be entered by the clerk on the roll and a copy sent to the lord-lieutenant. The clerk must also cause to be published in the *London Gazette* the names of the persons appointed deputy-lieutenants, with the dates of their commissions in like manner as commissions of officers of His Majesty's land forces.

The clerk must also from time to time, when required, send to a Secretary of State a complete account of the several descriptions of qualification delivered to him during the period mentioned in the requisition, and the Secretary of State must cause copies of every such account to be laid before both Houses of Parliament. A deputy-lieutenant acting without being duly qualified, or without having delivered the required description of his qualification, is liable to forfeit the sum of £200, but all his official acts are to be deemed valid. In legal proceedings for the recovery of such penalty the onus of proof of his qualification lies on the defendant.<sup>1</sup>

Lord-lieutenants and deputy-lieutenants acting in the execution of the Militia Acts are protected by the law relating to the protection of justices of the peace, and particularly with regard to limitations of action, notices of action, venue, tender of awards and payment into court, and other matters relating to actions provided by the Act.<sup>2</sup>

The office of lord-lieutenant is held during the pleasure of the Crown and is generally granted to political supporters of the Government. Upon a change of Government it is not usual for lord-lieutenants and their deputies to go out of office. Instances, however, have occurred where strong

<sup>1</sup> Sect. 34.

<sup>2</sup> Sect. 46.

opposition to the administration of the day has been followed by dismissal of the offender. This exception to the usual practice on a change in the Government has not proved entirely satisfactory. In many counties it is alleged that the lord-lieutenant who is politically opposed to the Government of the day refuses to comply with sect. 30 of the Act, which provides that he shall appoint at least twenty deputy-lieutenants. His object, of course, is to avoid appointing his political opponents to the office. But sect. 30 is mandatory. To make up the list of twenty, all duly qualified persons living within the county *must* be appointed.

Complaint is also made that the commissions of deputy-lieutenants who have ceased to reside within the county are not cancelled by the lord-lieutenants from the same political motives. It appears to be quite clear that a deputy-lieutenant who ceases to reside within the county *ipso facto* loses his qualification.

A still more serious grievance against lord-lieutenants in the immediate past has been the way in which they have used their powers of recommendation of justices of the peace for the county bench to the Lord Chancellor.

This power was so unscrupulously used as to amount to a public scandal and to lead to a demand for reform. This demand was met during the Liberal Administration, 1905-10, by the institution of county advisory committees to assist lord-lieutenants in the selection of candidates for the office, and by the Lord Chancellor adding names to the commission of the peace in those counties where the political inequality was most marked without first receiving any request through the lord-lieutenant.

The lord-lieutenant is still the senior magistrate of the county, and, as such, usually the *Custos Rotulorum*, or keeper of the rolls or records of the sessions of the peace. This appointment formerly lay with the Lord Chancellor, but in

1545 the right was transferred to the Crown. Until 1888 he appointed the clerk of the peace for the county. In that year the power of appointment was given to the Standing Joint Committee of the County Council and Quarter Sessions.<sup>1</sup>

The powers for the maintenance of civil order and the preservation of the peace, which lord-lieutenants shared with the sheriffs, under the Statute of 3 & 4 Edw. VI, c. 5, are not affected by recent legislation. As chief magistrate the lord-lieutenant is still responsible.

Thus with the Act of 1871, the military functions of the lord-lieutenants practically disappeared. These have now been revived by the Territorial and Reserve Forces Act 1907.<sup>2</sup>

By this Act the old militia, as such, has ceased to exist. The greater number of the existing battalions were in 1908 converted into units of the Special Reserve, and the remainder were disbanded. The Yeomanry too, as such, also ceased to be raised. With the exception of two Irish regiments, which were disbanded and reformed into Special Reserve units, the Yeomanry was absorbed into the Territorial Force, retaining, however, their former title of "Yeomanry." At the same time, the existing units of Volunteers were transferred to the Territorial Force, and Volunteers have not until the present war been raised in the United Kingdom. For the purposes of the reorganisation of the military forces other than the regulars and their reserves, and of the administration of such forces, and for other kindred purposes, county associations were established by the Act. It is provided that the lord-lieutenant of the county, or failing him, such other person as the Army Council may think fit, shall be constituted president of each county association. Thus the lord-lieutenant has been replaced in his former position of military responsibility

<sup>1</sup> 51 & 52 Vict., c. 41, s. 83 (2).

<sup>2</sup> 7 Edw. VII, c. 9.

wherever he has chosen to exercise his option of assuming the presidency of his county association. In most cases lord-lieutenants have accepted this office. Agreeably with his former powers under the Act of 1882, priority is to be given to recommendations of the lord-lieutenant, if president of the county association, in the case of all commissions to the lowest rank of officer in any unit of the Territorial Force. Where a unit comprises men of two or more counties, the recommendations for such appointments must be made in such rotation or otherwise as may be prescribed. Recruits may be attested by lord-lieutenants or their deputies.

With the creation of the Volunteer Training Corps, new fields of activity have been opened for lord-lieutenants and their deputies. Volunteer Training Corps are now affiliated to The Central Association Volunteer Training Corps, with Lord Desborough as President, and with its headquarters at the Royal Courts of Justice. Deeming it advisable that supervision over these corps should be exercised through the existing county associations, the Central Association invited the co-operation of the lord-lieutenants.

The office of deputy-lieutenant has hitherto been normally one of dignity only. In order to restore to deputy-lieutenants some of their former military functions, the formation of committees of deputy-lieutenants within their respective counties for the organisation and supervision of the Volunteer Training Corps for Home Defence has been suggested. Each deputy-lieutenant might become the general adviser in his appointed district to the several corps therein raised, and so form a link between the local committees of such corps and the county associations. Thus the various corps might be formed into county brigades subject to the authority of the county associations.

By an Order in Council, November 21st, 1907, it was announced that in future the King would consent to the appointment as deputy-lieutenants of such gentlemen only

as in addition to the qualification required under the Militia Act 1882, had held their military commissions for ten years or had rendered service to a county association under the Act of 1907.

The Lord-Warden of the Cinque Ports may *ex officio* be a member of the county association of Kent, or of Sussex, or of both. Whether this great officer is the lineal descendant of the *Littoris Saxonici* or *Tractus Maritimi Comes*, whose jurisdiction during the Roman occupation extended from Sussex to Norfolk, may be questioned, but there is no doubt at all that this office was in existence under the Saxons. From the Conquest he became known as the *guardian* or *warden*. In 1298, Robert Burghersh was lieutenant-warden of the Cinque Ports. These officials were both admirals by virtue of their command of the fleet of the ports, and wardens by virtue of their maintenance of the liberties of the ports on land.

Similarly the Warden of the Stannaries may *ex officio* be a member of the association of the county of Cornwall, or of the county of Devon, or of both. This official of the Crown was originally known as the lord-warden, and was usually a man of high position. In 1607, John Earl of Bath was lord-warden, and in 1624 Philip Earl of Pembroke and Montgomery. The lord-warden had exclusive civil and criminal jurisdiction over the miners within the stannaries. By the Militia Act 1882,<sup>1</sup> the Warden of the Stannaries is required, as if he were lieutenant of the counties of Cornwall and Devon, to appoint deputies, known as deputy-wardens of the stannaries, the number of whom need not exceed twelve. The qualification for the office of deputy is the same as that of deputy-lieutenant of a county.

The Governor or Deputy-Governor of the Isle of Wight is *ex officio* a member of the association of the county of Southampton.

London has always occupied a position of peculiar independence of royal authority, and when the Saxon portreeve gave place to the Norman mayor, this independence suffered little loss. By the Militia Act 1882,<sup>1</sup> the city continued to be a separate county for the purposes of the militia and to enjoy a commission of lieutenancy as a county. By the Territorial and Reserve Forces Act 1907,<sup>2</sup> the lord mayor is *ex officio* president of the association of the city. He it is who recommends for appointment all city lieutenants. The qualifications for deputy-lieutenants under the Act of 1882 do not apply to the latter.

For the purposes of the Act of 1907 the Isle of Man is deemed to be a separate county and the Governor of the Island is *ex officio* the lord-lieutenant.

Each of the Ridings of the county of York enjoys a separate commission of lieutenancy.

It has been asserted by some writers that the high-sheriff enjoyed a right of precedence, within his county, of every nobleman during his year of office, including the lord-lieutenant. From the history of the office of lord-lieutenant given above, it will appear abundantly clear that, from the time when the latter officer superseded the sheriff, the lord-lieutenant, as the King's *locum tenens*, was "the first man in the county." Blackstone, usually weak in legal history, appears to have been responsible for this mistake, in which he was followed by Disraeli, in *Lothair*, where he erroneously states "There is no doubt that in the county the high-sheriff takes precedence of everyone, even the lord-lieutenant."<sup>3</sup>

The question was finally set at rest by warrant, under the King's Royal Sign Manual, dated February 20th, 1904, directed to the Duke of Norfolk as Earl Marshal, declaring that whereas doubts and a diversity of practice had arisen in respect of the relative precedence of lord-lieutenants and high-sheriffs, lord-lieutenants should during their term of

<sup>1</sup> Sect. 50.

<sup>2</sup> Sect. 39 (3).

<sup>3</sup> Vol. II, 78.

office, and within the limits of their jurisdiction, have on all occasions, place, pre-eminence, and precedence before the sheriffs having concurrent jurisdiction.

Once more the lord-lieutenant has become the chief local military and civil personage, and with the proved efficiency of the Territorial Force in the field, his opportunities for national service have been enlarged. The public will certainly expect all lieutenants, without exception, to seize these opportunities and to realise them to the full.

HUGH H. L. BELLOT.

## II.—HABITUAL CRIMINALS AND SCOTTISH CONVICTIONS.

THE Prevention of Crime Act 1908, which enables the Court in certain circumstances to pass a sentence of "preventive detention" for a period varying from five to ten years, is not free from doubts, and it is intended in the following remarks to draw attention to the effect of convictions before Scottish Courts upon the provisions of Part II of the Act (Detention of Habitual Criminals) as administered in England.

The provisions of the Act which mainly concern us are as follows:—

### Section 10.—

"(2) A person shall not be found to be a habitual criminal  
"unless the jury finds on evidence—

"(A) That since attaining the age of sixteen years  
"he has at least three times previously to the con-  
"viction of the crime charged in the said indictment  
"been convicted of a crime, whether any such con-  
"viction was before or after the passing of this Act,  
"and that he is leading persistently a dishonest or  
"criminal life.

"(6) For the purposes of this section the expression 'crime' has the same meaning as in the Prevention of Crimes Act 1871, and the definition of 'crime' in that Act, set out in the Schedule to this Act, shall apply accordingly."

*Schedule.*—"The expression 'crime' means in England and Ireland any felony or the offence of uttering false or counterfeit coin, or of possessing counterfeit gold or silver coin, or the offence of obtaining goods or money by false pretences, or the offence of conspiracy to defraud, or any misdemeanour under the Fifty-eighth Section of the Larceny Act 1861."

The prevention of Crime Act 1908 applies to Scotland, and—

"in the application to Scotland of the provisions of this Act . . . . 'Secretary for Scotland' shall be substituted for 'Secretary of State' . . . . and the expression 'crime,' used in reference to previous convictions, means a crime of which a person has been convicted on indictment." (Sect. 17 (2).)

Put briefly, the question it is proposed to consider is this. In an English Court, when it is sought to satisfy sect. 10 (2) (A) (which requires proof of three convictions of a "crime"), is it competent to the prosecution to give in evidence, among the three necessary convictions, one or more Scottish convictions for acts which, if committed in England, would be "crimes" within the definition in the Schedule quoted above? Will three Edinburgh convictions for what we should call "arson" and what the Scots law calls "wilful fire-raising" be enough, coupled with the leading of a persistently dishonest and criminal life, to secure the preventive detention of a criminal?

(A) Now, by sect. 17 (4) it is provided that "sub-sect. 8 of sect. 10 shall not apply to Scotland," that is to say, the definition of "crime" in the Schedule above quoted does not apply to Scotland. This means, it is submitted,

that in Scottish proceedings the definition of "crime" is that given in sect. 17 (2) and not the definition contained in the Schedule. In other words, the Scottish definition of "crime" (sect. 17 (2)) applies in Scottish Courts, and the English definition (Schedule) applies in English Courts. Nowhere is it provided that, when an English Court is faced with Scottish convictions, it may have recourse to the Scotch definition, nor *vice versa*. This seems to be the flaw in the Act. "Sub-sect. (6) of sect. 10" (i.e., the English definition above quoted) "shall not apply to Scotland" (sect. 17 (4)), and similarly, the Scottish definition shall not apply to England. The latter half of the preceding sentence is not enacted in the Act, and does not require to be; for the Act applies in the first place to England and Ireland, and then with certain necessary alterations to Scotland.

It seems very doubtful whether Scottish convictions will satisfy the provisions of sect. 10 (2) (a) above set out, and it is submitted that the answer to our question may have to be in the negative.

We are not considering the Scottish Courts. They may have a similar problem and it is for the Scottish lawyer to solve it. But let us consider an English judge confronted with the definition of "crime" contained in the Schedule. A wicked act, to use a non-technical expression, must not be confused with a crime. The act may be equally wicked whether it is committed at any place between China and Peru or between John O'Groats House and Land's End. But the locality of the act makes all the difference when we are considering whether it comes within the meaning of "crime" in the Schedule. Let us analyse that definition. "B felony" is meaningless to a Scottish lawyer, as such. The Coinage Act of 1861 applies to Scotland as well as England and Ireland. "Obtaining goods or money by false pretences" becomes "Falschhood, fraud, and wilful

imposition" across the Border. "Conspiracy to defraud" is doubtless punishable in Scotland, though under a different title. The Larceny Act 1861 does not, except in one section (114), irrelevant for present purposes, apply to Scotland. How, then, can a prisoner who has done in Scotland an act which in England or Ireland would amount to one of the scheduled offences and been convicted in Scotland of an analogous, though not identical, offence, be said in an English Court to have committed a "crime" within the meaning of the definition in the Schedule? Only by re-trying the offence and hearing the witnesses can an English Court decide, in the majority of cases, whether the offence committed in Scotland would have amounted to a felony or one of the other scheduled offences if committed in England. It is incredible that the Legislature should have imposed upon criminal Courts such a task. The Act (sect. 10 (2) (A)) requires the proof (unless admitted by the prisoner) of three previous *convictions* for one or more of the scheduled "crimes." That is easily done in the case of English convictions, but the bare proof of a Scottish conviction would, in the majority of cases, be useless to a judge in deciding whether a "crime," under the Schedule, had been committed, unless he is prepared to go further and receive evidence of Scots law, and, in many cases, to re-try the case. (It may be true that in a few cases the facts necessary to constitute a particular crime in Scotland and the analogous crime in England are identical.)

Sect. 17 (2) does not tend to destroy the submission which is being made.

"In the application to Scotland of the provisions of this Act . . . . 'Secretary of Scotland' shall be substituted for 'Secretary of State' . . . . and the expression 'crime,' used in reference to previous convictions, means a crime of which a person has been convicted on indictment."

That applies to Scottish proceedings, that is, when a Scottish Court is being asked to pass sentence of preventive detention; and, it is submitted, cannot mean:—

“In an English Court evidence of one or more Scottish convictions for crimes, which in Scotland are indictable, may be given in evidence for the purpose of proving a person to be a ‘habitual criminal.’”

“Indictment” bears a totally different meaning in Scotland, as is clear from the case of *Reg. v. Slator* ([1881], 8 Q.B.D. 267), so that no common ground between the two jurisdictions can be found in the use of that word here. That “indictment” in this section must be so limited to its meaning in Scots law is clear; for otherwise the position would be that in an English Court the list of crimes given in the Schedule becomes, when a Scottish conviction is put in evidence, suddenly extended to include the whole gamut of (*anglice*) “indictable” crimes, which is vastly wider than the Schedule.

(B) Take France or Brazil instead of Scotland. Surely it is inconceivable that the technical words of the definition in the Schedule include the analogous offences (if such there be) in France or Brazil. A conviction in a foreign country is admissible evidence of a persistently criminal life (*R. v. Hearn* [1911], 7 Cr. App. R. 80). That is a different matter. Picking pockets may be an incident in a “dishonest or criminal life,” whether the scene of operations is Charing Cross Station or the Gare du Nord, but in the case quoted the French conviction for picking pockets was not given in evidence as one of the three necessary convictions. If the effect of a French conviction is correctly so stated, is there anything in the Act or in any other Statute or by Common law that makes the position of Scottish convictions different? It is submitted that there is not.

(c) The argument that technical words, such as appear in the Schedule above quoted, cannot have any operation outside England (which, of course, includes Wales) and Ireland, derives some support from certain instances in which the Criminal law expressly deals with matters occurring outside the jurisdiction of the United Kingdom. The Larceny Act 1896 imposes punishment for the receipt or possession of property stolen abroad, but the difficulty which would otherwise arise as to the meaning of "stolen outside the United Kingdom" is expressly dealt with by sect. 1 in the following way :— .

Section 1.—(1) [Punishment for receipt or possession of property stolen abroad.]

(2) "For the purposes of this section, property shall be deemed to have been stolen where it has been taken, extorted, obtained, embezzled, converted, or disposed of, under such circumstances that, if the act had been committed in the United Kingdom, the person committing it would have been guilty of an indictable offence, according to the law for the time being of the United Kingdom."

That is the sort of clause, extended from the particular to the general, and reciprocally applicable to England and Ireland and to Scotland respectively, which should have been inserted in the Prevention of Crime Act 1908 if it was intended to have the construction placed upon it which an affirmative answer to our question would demand.

Again, if we turn to the Extradition Acts 1870 and 1873, we find that the Legislature has made express provision for the difficulty of applying English technical terms to acts committed outside the jurisdiction. By sect. 26 of the Act of 1870 "The term 'extradition crime' means a crime which, if committed in England, or within English jurisdiction, would be one of the crimes described in the First Schedule to this Act." And the First Schedule begins as follows: "List of Crimes." The following list of crimes is

to be construed according to the law existing in England, or in a British possession (as the case may be), at the date of the alleged crime, whether by Common law or by Statute made before or after the passing of this Act: "Murder and attempt and conspiracy to murder, manslaughter," etc., etc.

(D) In conclusion, our question is: In an English Court, when it is sought to satisfy sect. 10 (2) (A) of the Prevention of Crime Act 1908 above set out, is it competent to the prosecution to put in evidence Scottish convictions for acts which, if committed in England, would be crimes within the definition in the Schedule above quoted? It is submitted, with hesitation, that the answer must be in the negative. The question has, however, received an affirmative answer in an unreported case which occurred recently at assizes in one of the border counties of England; and, inasmuch as it is a question which must frequently arise, we venture to hope that the Director of Public Prosecutions, whose consent is required by sect. 10 (4) to the indictment of a prisoner as a "habitual criminal," will find an early opportunity of having the doubt settled by the Court of Criminal Appeal.

ARNOLD D. McNAIR.

### III.—THE EFFECT OF WAR ON INSTALMENT DELIVERIES.

A CONSIDERABLE diversity of opinion exists amongst lawyers as to whether contracts which were entered into before the war with alien enemies, but which, on the outbreak of war, remained unexecuted, have, by reason of the declaration of war, been dissolved or abrogated, or whether such contracts are merely suspended.

It is contended by some—after stating that *prima facie*, every contract must be performed—that owing to the declaration of war, the contract, having become incapable or impossible of performance, is dissolved, and in so far as such contract has already been performed, is good, but any liability on the part of the person who has to perform the contract, and so far as regards the future performance thereof, is at an end and no longer exists. This contention, however, is not applicable to contracts of a purely personal nature.

On the other hand, others maintain that the contract is in a state of what may perhaps be described as “suspended animation” only, and that that part of the contract which has become impossible of performance by reason of the war will, immediately after the determination thereof, revive, and that the contract must hereafter be fulfilled or performed as if nothing had happened in the meantime to prevent the performance thereof.

Now, what are the rights of an English manufacturer who before the war entered into a contract here to supply a German or Austrian merchant with goods, to be delivered by instalments extending over a number of years, and which contract, in the ordinary course of events, might have come to an end during the continuance of the present war or not until after the determination thereof?

Has such a contract as before referred to been dissolved, as and from the time when war was declared, so that the manufacturer is discharged from the further performance thereof, or must he, on the determination of the war, perform the unfulfilled part or portion of the contract?

The leading case as to impossibility of performance of contracts is *Taylor and Another v. Caldwell and Another* ([1863], 3 Best & Smith's Reports, 2 B. 826). The facts of the case were that, by agreement dated the 27th day of May, 1861, the defendants let to the plaintiffs the Surrey

Gardens and Music Hall, Newington, Surrey, on certain specified days, for the purpose of giving a series of four grand concerts and day and night fêtes at the gardens and hall, and at the rent therein stated. The music hall was destroyed by fire, and the plaintiffs brought an action against the defendants for breach of the agreement, in that they did not nor would allow the plaintiffs to have the use of the Surrey Music Hall and Gardens according to the agreement, but wholly made default therein, etc.; whereby the plaintiffs lost divers moneys paid by them for printing advertisements of and in advertising the concerts, and also lost divers sums expended and expenses incurred by them in preparing for the concerts and otherwise in relation thereto, and on the faith of the performance by the defendants of the agreement on their part, and alleged that they had been otherwise injured. The defendants (*inter alia*) pleaded that, at the time of the agreement, there was a general custom of the trade and business of the plaintiffs and the defendants, with respect to which the agreement was made, known to the plaintiffs and the defendants, and with reference to which they agreed, and which was part of the agreement, that in the event of the gardens and music hall being destroyed, or so far damaged by accidental fire as to prevent the entertainments being given according to the intent of the agreement, between the time of making the agreement and the time appointed for the performance of the same, the agreement should be rescinded and at an end, and that the gardens and hall were so far damaged and destroyed by accidental fire, as to prevent the entertainments or any of them being given, and continued destroyed and damaged until after the times appointed for the performance of the agreement had elapsed. The Court held that there was no express stipulation for the event of the destruction of the music hall by fire, and that both parties were excused from performance of the contract.

"There seems no doubt," said Blackburn, J. (p. 833), "that where there is a positive contract to do a thing, not in itself unlawful, the contractor must perform it or pay damages for not doing it, although, in consequence of unforeseen accidents, the performance of his contract has become unexpectedly burthensome or even impossible. . . . But this rule is only applicable when the contract is positive and absolute, and not subject to any condition either express or implied; and there are authorities which, as we think, establish the principle that where, from the nature of the contract, it appears that the parties must from the beginning have known that it could not be fulfilled unless when the time for the fulfilment of the contract arrived some particular specified thing continued to exist, so that, when entering into the contract, they must have contemplated such continuing existence as the foundation of what was to be done; there, in the absence of any express or implied warranty that the thing shall exist, the contract is not to be construed as a positive contract, but as subject to an implied condition that the parties shall be excused in case, before breach, performance becomes impossible from the perishing of the thing without default of the contractor." And, at p. 839, the learned judge continues, "In the present case, looking at the whole contract, we find that the parties contracted on the basis of the continued existence of the music hall at the time when the concerts were to be given; that being essential to their performance."

In *Appleby and Another v. Meyers* (L. R. [1867], 2 C. P. (in the Exchequer Chamber), 651), which was an appeal from a judgment of the Court of Common Pleas, in favour of the plaintiffs upon a special case, the plaintiffs contracted to erect certain machinery upon the defendant's premises, at specific prices for particular portions, and to keep it in repair for two years. The price was to be paid upon the

completion of the whole. After certain portions of the work had been finished and others were in course of completion, the premises, with all the machinery and materials therein, were destroyed by an accidental fire. The plaintiffs brought an action in the Court of Common Pleas<sup>1</sup> against the defendant to recover £419, for work done and materials provided by the plaintiffs for the defendant, and the question for the Court was whether, under the circumstances of the case, the plaintiffs were entitled to recover the whole or any portion of the price. Montague Smith, J., held (see p. 621 of the lastly-mentioned report) that the plaintiffs could not recover the whole contract price as a specific sum, for that was only to be paid on the completion of the works, an event which had not happened, but that, under the circumstances, they were entitled upon an implied contract, to be paid the value of the work done. In the Exchequer Chamber, however, the judgment of the Court of Common Pleas was reversed, and it was decided that both parties were excused from the further performance of the contract, but that the plaintiffs were not entitled to sue, in respect of those portions of the work which had been completed, whether the materials used had become the property of the defendant or not.

Blackburn, J. (pp. 658-9), said, "The whole question depends upon the true construction of the contract between the parties. We agree with the Court below in thinking that it sufficiently appears that the work, which the plaintiffs agreed to perform, could not be performed unless the defendant's premises continued in a fit state to enable the plaintiffs to perform the work on them; and we agree with them in thinking that, if by any default on the part of the defendant, his premises were rendered unfit to receive the work, the plaintiffs would have had the

<sup>1</sup> L. R. [1866], 1 C. P. 615.

option to sue the defendant for this default, or to treat the contract as rescinded, and sue on a *quantum meruit*. But we do not agree with them in thinking that there was an absolute promise or warranty by the defendant that the premises should, at all events, continue so fit. We think that where, as in the present case, the premises are destroyed without fault on either side, it is a misfortune equally affecting both parties; excusing both from further performance of the contract, but giving a cause of action to neither." And at p. 660, "As it is, they are (*i.e.*, the plaintiffs), according to the principle laid down in *Taylor v. Caldwell*, excused from completing the work; but they are not therefore entitled to any compensation for what they have done, but which has, without any fault of the defendant, perished. The case is in principle like that of a shipowner who has been excused from the performance of his contract, to carry goods to their destination, because his ship has been disabled by one of the excepted perils, but who is not therefore entitled to any payment on account of the part-performance of the voyage, unless there is something to justify the conclusion that there has been a fresh contract to pay freight *pro rata*."

In *Baily v. De Grespigny* (L. R. [1868], Q. B. 180) the defendant, in 1840, demised by deed to the plaintiff a certain piece of ground, a messuage and other erections and buildings thereon, for 89 years from the 25th of March, 1840, and the defendant, among other things, covenanted with the plaintiff that neither he, the defendant, nor his heirs, nor his assigns, should or would, during the term, permit to be built, on the paddock fronting the premises demised by the deed towards the north, any messuage or dwelling-house, coach-house, or stable, or other erection, save and except summer or pleasure-houses in private garden ground, and also a church or chapel at the eastern extremity of the paddock. It was alleged as a breach of such covenant, that

the defendant permitted to be built on the paddock certain erections other than those by deed excepted, viz., a railway station with the appurtenances thereof, etc., and that after the making of the deed and demise, and during the term thereby granted, the defendant assigned the paddock to the London, Brighton and South Coast Railway Company, and that the company, after the assignment and during the term, and while they were possessed of the paddock, and by virtue of the assignment from the defendant, erected and built the railway station, with the appurtenances on the paddock, contrary to the covenant, to the damage of the plaintiff. To this, the plea was that, before the committing of the alleged breaches, and after the making of the deed, the railway company required to take and purchase the paddock under the powers given them by the London Brighton and South Coast Railway (New Lines) Act 1862, and for the purposes for which they were by the Act empowered to purchase and take the paddock. The substantial question for the Court was, whether the defendant was discharged from his covenant by the subsequent Act of Parliament, which put it out of his power to perform it. The Court held that he was, on the principle expressed in the maxim, *lex non cogit ad impossibilia.*

"We have first to consider," said Hannen, J. (p. 185), "what is the meaning of the covenant which the parties have entered into. There can be no doubt that a man may by an absolute contract bind himself to perform things which subsequently become impossible, or to pay damages for the non-performance, and this construction is to be put upon an unqualified undertaking, where the event which causes the impossibility was or might have been anticipated and guarded against in the contract, or where the impossibility arises from the act or default of the promisor."

"But where the event is of such a character that it cannot reasonably be supposed to have been in the contemplation

of the contracting parties when the contract was made, they will not be held bound by general words which, though large enough to include, were not used with reference to the possibility of the particular contingency which happens. It is on this principle that the act of God is in some cases said to excuse the breach of a contract. This is, in fact, an inaccurate expression, because, where it is an answer to a complaint of an alleged breach of contract that the thing done or left undone was so by the act of God, what is meant is that it was not within the contract; for, as is observed by Maule, J., in *Canham v. Barry*, a man might by apt words bind himself that it shall rain to-morrow or that he will pay damages. This is the explanation put by Lord Coke in *Shelley's Case*: 'If a lessee covenants to leave a wood in as good a plight as the wood was at the time of the lease, and afterwards the trees are blown down by tempest, he is discharged of his covenant,' because it was thought that the covenant was intended to relate only to the tenant's own acts, and not to an event beyond his control producing effects not in his power to remedy. It is on this principle that it has been held than an impossibility, arising from an Act of the Legislature subsequent to the contract, discharges the contractor from liability."

We proceed next to consider those cases which are generally known as "Coronation cases," and in which the rights of parties, under contracts which became impossible of performance, have been fully considered.

In *Herne Bay Steam Boat Company v. Hutton* (L. R. [1903], 2 K. B. C. A. 683) the defendant, who was desirous of chartering a steamboat called the *Cynthia*, of which the plaintiffs were owners, on the 23rd of May, 1902, entered into an agreement with them, the purport of which was that the *Cynthia* was to be at the defendant's disposal at an approved pier or berth at Southampton on the morning of the 28th of June, perils of the sea, etc., permitting, to

take out a party not exceeding the number for which the vessel was licensed, to the position assigned by the Admiralty, for the purpose of viewing the naval review and for a day's cruise round the fleet; also on Sunday, the 29th of June, for similar purposes. The owners were to provide crew, coals, and all necessary assistance, and the defendant was to pay all tolls, etc. The owners were also to have the right to ten persons above crew, etc., on board. The price was to be £250, payable £50 down, and the balance before the ship left Herne Bay. The review was officially cancelled on the 25th of June, 1902, whereupon, the ship being at Herne Bay, the director and secretary of the Company wired to the defendant, informing him that the *Cynthia* was ready to start the following morning, and that he was waiting for cash, but receiving no answer, it was decided by the plaintiffs that the ship should resume her ordinary sailings between Herne Bay and places on the Thames, which she did, and the plaintiffs made profits thereby on the 28th and 29th of June. On the latter day the defendant called upon the secretary of the Company, stating that, as the review had been cancelled, he did not require the use of the ship, and he therefore declined to pay the balance of £200 or to have anything more to do with the agreement. The plaintiffs thereupon brought an action against the defendant to recover the balance of £200 under the agreement. The case was tried before Grantham, J., who decided that the plaintiffs were not entitled to recover. The Court of Appeal, however, reversed the judgment of Grantham, J., and held that the plaintiffs were entitled to recover the sum of £200, less the profit made by the plaintiffs from having the use of the ship after the repudiation of the contract by the defendant, as (1) the venture was the defendant's, and the risk was his alone; and (2) that the happening of the naval review was not the sole basis of

the contract, so there had been no total failure of consideration, nor a total destruction of the subject-matter of the contract. "Mr. Hutton, in hiring this vessel," said Vaughan Williams, L.J. (p. 689), "had two objects in view: first, of taking people to see the naval review, and, secondly, of taking them round the fleet. These, no doubt, were the purposes of Mr. Hutton, but it does not seem to me that because, as it is said, these purposes became impossible, it would be a very legitimate inference that the happening of the naval review was contemplated by both parties as the basis and foundation of this contract, so as to bring the case within the doctrine of *Taylor v. Caldwell*. On the contrary, when the contract is properly regarded, I think the purpose of Mr. Hutton, whether of seeing the naval review or of going round the fleet with a party of paying guests, does not lay the foundation of the contract within the authorities."

And Romer, L.J. (p. 691), said, "In the present case I may point out that it cannot be said that by reason of the failure to hold the naval review there was a total failure of consideration. That cannot be so. Nor is there anything like a total destruction of the subject-matter of the contract. Nor can we, in my opinion, imply in this contract any condition in favour of the defendant which would enable him to escape liability. A condition ought only to be implied in order to carry out the presumed intention of the parties, and I cannot ascertain any such presumed intention here. It follows that, in my opinion, so far as the plaintiffs are concerned, the objects of the passengers on this voyage with regard to sight-seeing do not form the subject-matter or essence of this contract."

Then, in *Krell v. Henry* (L. R. [1903], 2 K. B. 740), which was an appeal from a decision of Darling, J., the plaintiff sued the defendant for £50, being the balance of a sum of £75, for which the defendant had agreed by

contract to hire a flat at 56a, Pall Mall, on the 26th and 27th of June, 1902, for the purpose of viewing the processions to be held in connection with the coronation of His Majesty. Nothing was mentioned in the agreement as to the processions or for what purpose the flat was taken. The defendant had paid £25 as a deposit. The processions not having taken place on the dates originally fixed, the defendant declined to pay the balance of £50 due under the contract. It was held (affirming the decision of Darling, J.) that as the rooms were let and taken for the purpose of seeing the royal processions, and that the coronation processions were the foundation of the contract, that the words imposing on the defendant the obligation to accept and pay for the use of the flat for the days named, though general and unconditional, were not used with reference to the possibility of the particular contingency which afterwards happened, and consequently that the plaintiff was not entitled to recover the balance of the rent fixed by the contract. In the last-mentioned case *Taylor v. Caldwell* was discussed and applied. Vaughan Williams, L. J. (p. 749), said, "I think that you first have to ascertain, not necessarily from the terms of the contract, but, if required, from necessary inferences, drawn from surrounding circumstances recognised by both contracting parties, what is the substance of the contract, and then to ask the question whether that substantial contract needs for its foundation the assumption of a particular state of things. If it does, this will limit the operation of the general words, and in such case, if the contract becomes impossible of performance by reason of the non-existence of the state of things assumed by both contracting parties as the foundation of the contract, there will be no breach of the contract thus limited." . . . . (and at p. 751), "Each case must be judged by its own circumstances. In each case one must ask oneself,

first, what, having regard to all the circumstances, was the foundation of the contract? Secondly, was the performance of the contract prevented? Thirdly, was the event which prevented the performance of the contract of such a character that it cannot reasonably be said to have been in the contemplation of the parties at the date of the contract? If all these questions are answered in the affirmative (as I think they should be in this case), I think both parties are discharged from further performance of the contract. I think that the coronation procession was the foundation of this contract, and that the non-happening of it prevented the performance of the contract; and secondly, I think that the non-happening of the procession, to use the words of Sir James Hannen in *Baily v. De Grespigny*, was an event 'of such a character that it cannot reasonably be supposed to have been in the contemplation of the contracting parties when the contract was made, and that they are not to be held bound by general words which, though large enough to include, were not used with reference to the possibility of the particular contingency which afterwards happened.' The test seems to be whether the event which causes the impossibility was or might have been anticipated and guarded against."

In *Blakelcy v. Miller & Co.* and *Hobson v. Pattenden & Co.* (L. R. [1903], 2 K. B. 760, note 4, and 88 L. T. R. 90) the facts were as follows: In the former case, which was an appeal by the plaintiff from the judgment of the judge of the Clerkenwell County Court, the plaintiff brought an action against the defendant to recover the return of the sum of fifteen guineas, paid by him to the defendants for three seats in a shop to view the coronation procession on the 27th of June, 1902. The County Court judge gave judgment for the defendants. In the latter case, which was an appeal by the plaintiff from a judgment of the judge of the Southwark County Court, the plaintiff purchased two

tickets, for two seats, to view the coronation procession from a stand erected by the defendants, for which he paid fourteen guineas, and afterwards sought to recover this amount from the defendants. The County Court gave judgment for the defendants. Both plaintiffs appealed, and it was held that they were not entitled to recover.

Lord Alverstone, C.J., in delivering judgment (pp. 91-2 of 88 *Law Times Reports*) said, "The Court has to deal with two cases in which there was nothing in the contract contemplating the terrible event which took place. It is true that the contracts were entered into with the expectation that the procession would take place; and, in one way, the fact that the procession would take place was the basis of the contract, because there would have been no contract if the procession had not been going to take place. The plaintiffs relied on *Taylor v. Caldwell*, and said that that decision was sufficient to enable them to get their money back, but that case does not go so far as they contend. It decided that, where there is a lawful contract, and the performance becomes impossible from some cause for which neither party is responsible, and the party sued has not contracted or warranted that the event, the non-occurrence of which had caused the contract not to be possible of performance, shall take place, then the parties are excused from further performance of the contract. I have no doubt that the principles in *Taylor v. Caldwell* and *Appleby v. Meyers* apply, but the consequence is that neither party can any longer be sued on the contract for anything that was to be done afterwards. The one party could not be compelled to finish the seats, and plaintiff no longer had a right to go into the seats and sit there, and if no money was then due under the contract, the person who might have been ultimately liable could not be compelled to pay. The plaintiffs seek to go further, and say that they can recover what they have paid. That is contrary to *Appleby v. Meyers* (16 L. T. R. 669,

L. R., 2 C. P. 651), but whether it is so or not, there is nothing in *Taylor v. Caldwell* that suggests that, where money has been *bonâ fide* paid, the party who has paid can recover it because the further performance has become impossible. I cannot imagine a more unjust application of such a principle than if it were to lead to the result for which the plaintiffs contend. Each party rests in the same position in which he was found when the event occurred, unless there is something in the special terms of the contract which enables one or the other to say that his rights are controlled by those terms."

And Channell, J. (p. 92), said, "It is obvious that where the parties have contemplated a certain event in a contract you must spell out what the true contract is. The parties here have not contemplated at all the events that happened. In *Krell v. Henry* it does not appear whether there was any express contract as to when the money was payable. If the money was payable on some day subsequent to the abandonment of the procession, I do not think it could have been sued for. If, however, it was payable prior to the abandonment of the procession, the position would be the same as if it had been actually paid, and could not be recovered back, and could be sued for. All *Taylor v. Caldwell* (*sup.*) says, is that the parties are to be excused from the performance of the contract, and *Appleby v. Meyers* says, from the further performance."

In *Chandler v. Webster* (L. R. [1904], 1 K. B. 493) the action was brought by the plaintiff to recover the sum of £100 paid by him to the defendant as on a total failure of consideration, and the defendant counterclaimed for a sum of £41 : 15s. The facts of the case were that the defendant had agreed to let to the plaintiff the first-floor room and the use of the ante-room at back, at 7, Pall Mall, W., to view the first coronation procession on the 26th of June,

1902, for £157 : 10s., less 10 per cent., £15 : 15s. = £141 : 15s. The price of the room was payable before the procession. The plaintiff had paid £100 on account of the price of the room, but owing to the illness of the King, the procession did not take place. It was held that the plaintiff could not recover the £100, and that the defendant was entitled to payment of the balance of £41 : 15s., because the contract was that the price of the room should be paid before the time at which the procession became impossible.

"A person," said Collins, M.R. (p. 497), "who has agreed to pay a sum of money cannot be in a better position by reason of his having failed to perform his obligation to pay it at the time when he ought to have done so, than that which he would have occupied if he had paid the money in accordance with the contract. If that be so, the question which we have to consider is whether the contract entered into bound the plaintiff to pay the price of the room before the date at which the procession became impossible. In my opinion, it did so bind him, and it was not a condition precedent to his obligation to pay the money that the procession should take place," and at pp. 499, 500, "The plaintiff contends that he is entitled to recover the money which he has paid, on the ground that there has been a total failure of consideration. He says that the condition on which he paid the money was that the procession should take place, and that, as it did not take place, there has been a total failure of consideration. That contention does, no doubt, raise a question of some difficulty, and one which has perplexed the Courts to a considerable extent in several cases. The principle on which it has been dealt with is that which was applied in *Taylor v. Caldwell*, namely, that, where, from causes outside the volition of the parties, something which was the basis of, or essential to the fulfilment of, the contract, has become impossible, so that, from the time

when the fact of that impossibility has been ascertained, the contract can no further be performed by either party, it remains a perfectly good contract up to that point, and everything previously done in pursuance of it must be treated as rightly done, but the parties are both discharged from further performance of it. If the effect were that the contract were wiped out altogether, no doubt the result would be that money paid under it would have to be repaid as on a failure of consideration. But that is not the effect of the doctrine; it only releases the parties from further performance of the contract. Therefore the doctrine of failure of consideration does not apply. The rule adopted by the Courts in such cases is, I think, to some extent an arbitrary one, the reason for its adoption being that it is really impossible in such cases to work out with any certainty what the rights of the parties in the event which has happened should be. Time has elapsed, and the position of both parties may have been more or less altered, and it is impossible to adjust or ascertain the rights of the parties with exactitude. That being so, the law treats everything that has already been done in pursuance of the contract as validly done, but relieves the parties of further responsibility under it."

And Romer, L.J. (p. 501), said, "Where there is an agreement which is based on the assumption by both parties that a certain event will in the future take place, and that event is the foundation of the contract, and, through no default by either party, and owing to circumstances which were not in the contemplation of the parties when the agreement was made, it happens that, before the time fixed for that event, it is ascertained that it cannot take place, the parties thenceforth are both free from any subsequent obligation cast upon them by the agreement; but, except in cases where the contract can be treated as rescinded *ab initio*, any payment previously made, and any legal right

previously accrued according to the terms of the agreement, will not be disturbed. The present case appears to me to come within that proposition. I think the agreement here was such that, when it turned out that the procession could not take place, the result was that both the parties were thenceforth free from all further obligations under the contract. In my opinion, it was not a contract which could then be treated as rescinded *ab initio*. That being so, any legal right which had previously accrued to either party remained in force, and for the reasons given by the Master of the Rolls, which I need not repeat, I think that one of those rights was that of the defendant to payment of the sum of £141 : 15s. in pursuance of the agreement."

We shall next proceed to consider a different class of case than those before referred to, namely, those cases which have been decided on contracts directly affected by war.

In *Furtado v. Rogers*<sup>1</sup> it was decided that an insurance effected in Great Britain on a French ship previous to the commencement of hostilities between Great Britain and France does not cover a loss by British capture. Lord Alvanley, Ch. J. (p. 198), said, "We are all of opinion that on the principles of English law it is not competent to any subject to enter into a contract to do anything which may be detrimental to the interests of his own country; and that such a contract is as much prohibited as if it had been expressly forbidden by Act of Parliament. It is admitted that if a man contract to do a thing which is afterwards prohibited by Act of Parliament, he is not bound by his contract. This was expressly laid down in *Brewster v. Kitchell* (1 Salk. 198). And on the same principle, where hostilities commence between the country of the underwriter and the assured, the former is forbidden to fulfil his contract."

<sup>1</sup> 1802, Bos. & Pul., Vol. 3, 191.

In *Clementson v. Blessig and Another* ([1855], 11 Exch., 135) the facts (which are taken from the judgment of Pollock, C. B., at p. 140) were shortly as follows: the defendants, on the plaintiff doing certain things, undertook to accept the plaintiff's draft. The plaintiff, having done these things, called upon the defendants to perform their undertaking, when they set up as a defence the illegality of the transaction; in answer to which the plaintiff, in his replication, set out an Order in Council. It was decided that the plaintiff was entitled to judgment; for, assuming that the declaration of war would, of itself, have made it illegal for the plaintiff to send the goods to an enemy, they might have been lawfully shipped within the period mentioned in the Order in Council.

"I am of opinion," said Pollock, C. B. (p. 140), "that the plaintiff is entitled to judgment. The question is whether the contract is illegal, and, therefore, in law, incapable of being performed. I am of opinion it is not. Apart from the declaration of war with Russia, the case would be free from doubt. . . . I am of opinion that the Order in Council rendered the transaction capable of being performed. The defendants might, within the time limited, have shipped the goods on board a neutral or a Russian vessel, and so have delivered them to the persons for whom they were intended."

And, in a footnote to the report of the above case, at p. 144, it is stated: "Secondly, as to contracts with an alien, unexecuted at the time of the declaration of war. With the exception of the passage cited from *Abbott on Shipping*, p. 596, there is little authority on the subject; but it would seem to follow, from the rule above stated, that the declaration of war renders such contracts void."

The passage cited from *Abbott on Shipping*, p. 596, 8th ed., will be found on p. 139 of the report of *Clementson v. Blessig and Another*, and reads as follows: "Another general rule

of law furnishes a dissolution of these contracts by matters extrinsic. If an agreement be made to do an act lawful at the time of such agreement, but afterwards, and before the performance of the act, the performance be rendered unlawful by the Government of the country, the agreement is absolutely dissolved. If, therefore, before the commencement of a voyage, war or hostilities should take place between the State to which the ship or cargo belongs and that to which they are destined, or commerce between them be wholly prohibited, the contract for the conveyance is at an end; the merchant must unlade his goods, and the owners find another employment for their ships."

In *Esposito v. Bowden*<sup>1</sup> it was agreed by a certain memorandum for charter, dated the 16th September, 1853, between the plaintiff, therein described as of Naples, master of the ship called the *Maria Christina*, of Naples, then in Hull, and the defendant, that the said ship should take an outward cargo from the Tyne to Naples, and after discharging same, sail and proceed to Odessa, or so near thereto as she might safely get, and there load from the factors of the said freighter a full and complete cargo of wheat, seed or other grain, etc., and proceed to Falmouth, etc. The act of God, the Queen's enemies, fire, and all and every other dangers and accidents of the seas, rivers and navigation, of what nature or kind soever, during the said voyage, excepted. Thirty-five running days were to be allowed the said merchants (if the ship were not sooner dispatched) for loading and unloading, to commence at her port of loading on her being ready to load; laying days at port of discharge to commence, etc. And, for demurrage over and above the said laying days, the said freighter agreed to pay £4 per day, detention by frost or quarantine not to be reckoned as lay days. The breach alleged was that, although a reasonable time for loading

<sup>1</sup> 1857, Fl. & Bl., Vol. 7, p. 763.

the cargo had elapsed, defendant made default in loading the agreed cargo, and further, that he detained the ship on demurrage ten days above the laying days, and did not pay for such demurrage. The plea to this allegation was, that the defendant was and always had been a subject of the Queen; and that Odessa, the port where the said ship was to load her said cargo, was a port of Russia, within the dominions of the Emperor of Russia; that after the making of the charter-party, and before the ship arrived at Odessa, and before the defendant provided or purchased any cargo to be landed on board the ship, viz., the 29th March, 1854, the Queen declared war against the Emperor of Russia, and from that time war had existed and Odessa had been a hostile port in the possession of the Queen's enemies; that from the time war was so declared as aforesaid, it became and was impossible for the defendant to perform his said agreement and fulfil the terms of the said memorandum of charter without dealing and trading with the Queen's enemies, of which the plaintiff, before the expiration of the said laying days in the said charter-party mentioned, had notice. There was a replication as to certain Orders in Council, etc. The Court of Exchequer Chamber, reversing the judgment of the Queen's Bench, decided that the plea was good, as showing a dissolution of the contract before the time for the performance had expired, and an impossibility of legally performing the contract, as the shipment of the cargo from an enemy's port, even in a neutral vessel, was an act, *prima facie* at least, involving a trading and dealing with the enemy, and therefore forbidden by law to a British subject, and that if such a shipment could under peculiar facts be legal, it lay on the plaintiff to show the facts, which he had not done. It was also held by both Courts that the replication did not answer the plea, because the first Order in Council related only to neutral or hostile goods or ships; the second only to Russian ships; and the

Third was not shewn to have come into operation after the alleged dissolution of the contract.

"It is now fully established," said Willes, J. (p. 779), "that, the presumed object of war being as much to cripple the enemy's commerce as to capture his property, a declaration of war imports a prohibition of commercial intercourse and correspondence with the inhabitants of the enemy's country, and that such intercourse, except with the licence of the Crown, is illegal." And, at p. 781, "the force of a declaration of war is equal to an Act of Parliament, prohibiting intercourse with the enemy except by the Queen's licence." And then, at page 783, the same learned judge continues: "As to the mode of operation of war upon contracts of affreightment made before, but which remain unexecuted at, the time it is declared, and of which it makes the further execution unlawful or impossible, the authorities establish that the effect is to dissolve the contract and to absolve both parties from further performance of it. Such was the opinion of Lord Ellenborough at a time when the question must recently have often occurred and been well considered and understood, in *Barker v. Hodgson* ([1814], 3 M. & S. 267, 270), where it was held that the prevalence of an infectious disorder at the port of loading, and consequent prohibition of intercourse by the law of the port, were not sufficient to excuse the charterer from loading; and Lord Ellenborough, in delivering judgment, said: "The question here is, on which side the burthen is to fall. If indeed the performance of this covenant had been rendered unlawful by the Government of this country, the contract would have been dissolved on both sides, and this defendant, inasmuch as he had been thus compelled to abandon his contract, would have been excused for the non-performance of it, and not liable to damages. But if, in consequence of events which happen at a foreign port, the freighter is prevented from furnishing the loading there,

which he has contracted to furnish, the contract is neither dissolved nor is he excused for not performing it, but must answer in damages."

"So, by the Common law, says the learned author of *Chitty on Contracts* (p. 184, 16th ed., 1912), if there was a contract with an alien, and whilst it was merely executory, war broke out between this country and that of the alien, this would dissolve the contract. And, in support of this statement, in footnote (p. 184), he refers to Roll. Abr. Alien (B) and to the case of *Exposito v. Boedden* (*sup.*).

In *Jansen (Appellant) and Driefontein Consolidated Mines, Limited (Respondents)* (L. R. [1902], A. C. 484), the respondents were a company registered under the law of the South African Republic, and in August, 1899, insured with the appellant and other underwriters gold against (*inter alia*) "arrests, restraints and detannments of all kings, princes and people" during its transit from the gold mines near Johannesburg in the Transvaal to the United Kingdom. The gold was, on the 2nd of October, 1899, and whilst in transit, seized on the frontier by the order of the Government of the South African Republic. On the 11th of October, at 5 p.m., a state of war began between the British Government and the Government of the Republic. At the time of seizure it was admitted that war was imminent. The head office of the respondent company was in Johannesburg; but it had also an office in London. The majority of shareholders were resident outside of the Republic, and were not subjects thereof. The respondent company having brought an action against the appellant upon the policy, it was agreed between the parties that the action should be considered as having been brought after the war. The Court decided that the insurance effected was valid, and that an action might be maintained against the underwriters after the restoration of peace, though the seizure was made in contemplation of war, and in order

that the gold might be used in support of the war. The important date was the seizure before war was declared.

Earl of Halsbury, L. C. (p. 493), said, "No contract or other transaction with a native of the country which afterwards goes to war is affected by the war. The remedy is indeed suspended; an alien enemy cannot sue in the Courts of either country while the war lasts, but the rights on the contract are unaffected, and when the war is over the remedy in the Courts of either is restored."

And Lord Davey, after referring to the rules established by the Common law (p. 499), said, "The third rule is that, if a loss has taken place before the commencement of hostilities, the right of action on a policy of insurance by which the goods lost were insured is suspended during the continuance of war, and revives on the restoration of peace. In the present case the third rule would have constituted a defence to the present action, but the parties, being desirous to obtain a decision on the merits of the case, waived the objection."

"A seizure after war has broken out," said Lord Lindley (p. 508), "is very different from a seizure before war has been declared or has actually commenced. It appears to be settled that a British subject cannot, even before war, insure a person against any loss sustained by him after the war began and whilst he is an enemy of this country (see *Furtado v. Rodgers* (*sup.*) and *Brandon v. Curling*). Those were cases of capture after war, by the British forces in the first case, and by our Allies in the second case, and these authorities go far to show that if the seizure here had been after war had broken out, the policy would not have covered such a loss"; and, at p. 509, the same learned judge continues, "War produces a state of things giving rise to well-known special rules. It prohibits all trading with the enemy, except with the Royal licence, and dissolves all contracts which involve such trading (see *Esposito v. Bowden*)."

The effect of the above decisions as to contracts for instalment deliveries which have been entered into before the war, but which were unexecuted at the time when war was declared, and of which the execution has been rendered unlawful or become impossible, is that the parties are released from the further performance thereof, and from thenceforth are free from all further obligations thereunder—in other words, such contracts are dissolved or abrogated. Any right of action which has accrued to an alien enemy before war has been declared is suspended.

The outbreak of war, however, does not suspend an action in which an alien enemy is defendant. Thus, in *Robinson & Co. v. Continental Insurance Company of Mannheim* (L. R. [1915], 1 K. B. 155), an action was brought by the plaintiffs, who were British subjects, against the defendants, a German insurance company, to recover a loss under a policy of marine insurance. The policy was effected, the loss occurred, and the pleadings were closed before the 4th of August, 1914, when war was declared between Great Britain and Germany. The defendants took out a summons asking that all proceedings should be stayed during the war, and the summons was adjourned into Court. It was held that the application should be dismissed.

Bailhache, J. (p. 158), said, ". . . . The contention is that, by the Common law of England, all actions between British subjects and alien enemies are suspended during war, and further, that an alien enemy cannot appear and cannot be heard in our Courts during hostilities . . . . But to hold that a subject's right of suit is suspended against an alien enemy is to injure a British subject and to favour an alien enemy and to defeat the object and reason of the suspensory rule. It is to turn a disability into a relief. I know of no modern English authority on the point except a statement by Lord Davy in the *Driefontein Case*, where he lays down three rules

which he says are established in our Common law, and expresses the third rule thus: 'The third rule is that, if a loss has taken place before the commencement of hostilities, the right of action on a policy of insurance by which the goods were insured is suspended during the continuance of war and revived on the restoration of peace.'"

"If this is a correct expression of the rule, it covers by its terms the case of an alien enemy defendant as well as an alien enemy plaintiff. It is not the decision of the House of Lords in that case, and is not, therefore, binding upon me, although of course it is a statement of the law entitled to great weight. In that case, however, the point did not arise for decision; moreover, the alien enemy in that case was the plaintiff and the British subject was the defendant, and I doubt whether Lord Davey contemplated the converse case. I observe that other Members of the House who took part in that decision confine themselves to the statement that an alien enemy cannot sue while the war lasts." (See per Lord Halsbury, at p. 493; Lord Lindley, at pp. 509 and 510.) ". . . . The statement of the rule by Lord Davey seems to me to be expressed in too wide terms"; and, at p. 161, the learned judge said, "I have come to the conclusion that there is no rule of Common law which suspends an action in which an alien enemy is defendant, and no rule of Common law which prevents his appearing and conducting his defence."

In *W. L. Ingle Limited v. Mannheim Insurance Company* (L. R. [1915], 1 K. B. 227) the action was brought to recover a loss under a policy of marine insurance, issued by the defendant company to the plaintiffs on the 31st of July, 1914. The defendant company was incorporated in the Grand Duchy of Baden, where it had its head office. It had a branch office in London, where it carried on the business of insurance through its underwriters and agents, who accepted and settled risks and issued policies for the

company. The company had complied with the provisions of sect. 274 of the Companies (Consolidation) Act 1908, relating to companies established outside the United Kingdom which have a place of business within the United Kingdom. The policy sued upon had been effected through the company's office in London. It contained a clause giving jurisdiction to the English Courts as fully as if the company were incorporated in England and authorising the service of process upon its agents in this country. The loss in respect of which the action was brought occurred at the end of August or the beginning of September, 1914, and the plaintiffs' alleged right to sue accrued to them, and was complete before the Trading with the Enemy Proclamation of the 8th of October, 1914. A summons was issued to transfer the action to the commercial list. The defendants opposed the application to transfer on the ground that the obligation to pay the losses was suspended because of the war. It was decided, first, that apart from the Proclamation of the 8th of October, 1914, the rules applicable to trading with alien enemies did not apply to business transacted with the branch office; and, secondly, that, assuming that the Proclamation had a retrospective effect, a claim to recover a loss under a policy was not a "transaction" within clause 5 of the Proclamation, and that the action could, therefore, be maintained. After adverting to clause 6 of the Proclamation of the 9th of September, 1914, and to clause 5 of the Proclamation of the 8th of October, 1914, Bailhache, J. (pp. 231 and 232), said, "The defendants are therefore, since that date, in the same position as alien enemies in respect of their business transacted here, but I agree with the plaintiffs that the Proclamation is not retrospective. Even if this Proclamation is to be treated as affecting the position, I am not prepared to hold that payment of a loss by a German insurance company, or an action against such insurance company to recover a loss,

is a 'transaction' within the meaning of the Proclamation. So to hold would be to deprive a British subject of the right to receive money from, or to sue, an alien enemy, which, in my opinion, he at law has, at any rate when the right to be paid or to sue has accrued before the defendant has acquired the status of an alien enemy; and I should require to find clear words in a proclamation to induce me to decide that the Executive Government has given the alien enemy relief to which he is not otherwise entitled."

And in *Porter v. Freudenberg, Kreglinger v. S. Samuel and Rosenthal, In re Merten's Patents* (L. R. [1915], 1 K. B. 857), it has been held, that the question whether a person is an alien enemy or not, is not tested by his nationality, but by the place in which he resides or carries on his business. A person who voluntarily resides or carries on a business in an enemy's country is an alien enemy. An alien enemy cannot sue in the King's Courts, unless he be within the realm by the licence of the King. An alien enemy may be sued in the King's Courts, and, if sued, has a right to enter an appearance and to defend the action; he has also the right to appeal against any decision, final or interlocutory, that may be given against him. But an alien enemy, who is plaintiff in an action commenced before the outbreak of war, has no right of appeal; his right of appeal is suspended until the conclusion of peace. Should an action be brought against an alien enemy resident in the enemy's country, who carries on a branch business in this country by means of an agent, leave may be given to the plaintiff to issue a concurrent writ and to make substituted service of a notice of the writ by service of the notice upon the defendant's agent in this country.

In *Associated Portland Cement Manufacturers* (1900) (*Limited*), v. *William Cory and Son Limited* (*The Times Law Reports*, Vol. 31, p. 442, 23rd May, 1915), the question was, whether a contract which had been entered into for

#### 444 THE EFFECT OF WAR ON INSTALMENT DELIVERIES

a number of years was, under the particular circumstances of the case, dissolved by reason of the war, or suspended. The facts of the case were that the plaintiffs and the defendants entered into an agreement dated the 15th of March, 1910, whereby the defendants agreed to provide ships to carry all cement, from the Thames to the Firth of Forth, which the plaintiffs were bound to deliver to the contractors to the Admiralty for building the Rosyth naval base. The contract was to continue until the 7th of December, 1916, the freight payable was 2s. 2d. per ton. The agreement was subject to certain exceptions, one of which was "perils of the seas, enemies, pirates, arrests, and restraints of princes, rulers, and peoples."

The defendants refused, in December, 1914, to carry at the agreed rates, and demanded 2s. per ton more, which the plaintiffs refused to pay, and in January, 1915, they chartered the defendants' steamship *Hornsey* at the market rate of 7s. per ton for the carriage of 610 tons, but without prejudice to their right to recover back the excess freight.

The plaintiffs claimed from the defendants £145: 19s. 4d. as damages for breach of contract or as money paid under protest. It was contended by the defendants that the aforesaid agreement was entered into in time of peace and in contemplation of peace conditions and the continuance of such conditions was the basis and substratum of the agreement. By the outbreak of the war, and the conditions resulting therefrom, such basis and substratum entirely failed, and the nature and substance of the contract became entirely changed and the agreement became impossible of performance. The defendants also claimed to be absolved from liability under the agreement by the exceptions, "perils of the seas, enemies, pirates, arrests and restraint of princes," and also relied on sect. 1, sub-sect. 2, of the Defence of the Realm (Amendment) No. 2 Act 1915. Judgment was given for the plaintiffs.

Rowlatt, J., thought (pp. 443-4) that the rule in *Taylor v. Caldwell* (*sup.*) only applied when the specific thing, the existence of which lay at the foundation of the contract, no longer existed, and that *Krell v. Henry* (*sup.*) decided that it was necessary to look at the surrounding circumstances to see what was the foundation of the contract, and that the question was whether the whole contract was suspended, and before he could say that he must find that the whole contract was incapable of fulfilment owing to the Government's interference.

From the above observations, it would appear that the learned judge considers that, where the whole contract becomes incapable of fulfilment owing to Government interference, it is capable of suspension. Assuming, however, the contract becomes impossible of fulfilment by a declaration of war, or by a prohibition to trade with the enemy, does this suspend the contract or dissolve it? If the learned judge's views are correct, it would appear that in the latter cases the contract is suspended and not dissolved. If this is so, the previous decisions which decide that, where a contract has become impossible of performance, the parties thereto are excused from further performance, no longer hold good.

It may be that, in many cases, to hold that a contract, which has become impossible of performance, is dissolved, is a hardship; on the other hand, it would also be a hardship to hold that the contract was suspended.

As is well expressed by Collins, M.R., in *Chandler v. Webster* (*sup.*) (p. 499), ". . . . It is really impossible in such cases to work out with any certainty what the rights of the parties in the event which has happened should be. Time has elapsed, and the position of both parties may have been more or less altered, and it is impossible to adjust or ascertain the rights of the parties with exactitude. That being so, the law treats everything that has already

been done in pursuance of the contract as validly done, but relieves the parties of further responsibility under it."

By sub-sect. 1 of sect. 1 of the Legal Proceedings against Enemies Act 1915 (5 Geo. V, c. 36), leave may be given to issue a writ of summons in the High Court for service on an enemy out of the jurisdiction, or of which notice is to be given to an enemy out of the jurisdiction, if the Court or judge is satisfied that the case is a case to which the section applies, and the Court or judge may, as and in manner therein mentioned, make an order (in the Act referred to as an enemy service order) directing substituted or other service of the writ or the substitution of notice for service by means of advertisement or otherwise; and on that order being complied with, all proceedings may be taken on the claim as if the writ had been served on the enemy defendant by the usual means.

And, by sub-sect. 5 of sect. 1, the fact that, for the purpose of obtaining the benefit of the said section, a writ of summons has been endorsed only with a claim for a declaration in accordance therewith, shall not prevent any other declaration or any consequential or other relief being claimed in other proceedings, or prevent the case being dealt with, although no such other declaration or consequential or other relief is claimed.

By sub-sect. 6 of sect. 1, the latter section applies to cases where (a) the plaintiff is a British subject and is entitled for the time being to bring an action in the High Court; and (b) the defendant or one of the defendants is an enemy; and (c) the writ is endorsed only with a claim for a declaration as to the effect of the present war on rights or liabilities of the plaintiff or defendant under a contract entered into before the outbreak thereof; and (d) there is written evidence of the contract.

#### IV.—INTERNATIONAL LAW AND THE LAW OF THE LAND.

THE present war has brought before the Courts for decision many cases in which questions of International law arise, and as time goes on these cases will doubtless increase. In connection with such cases, there emerges a question which has hitherto been mainly of academic importance, but which has now become a matter of real practical interest, and that is the relation between International law and the ordinary law of the land. Is International law a part of the ordinary Municipal law, and, if so, to what extent? Now, there are not wanting jurists who declare that, in relation to Municipal law, International law occupies a position of pre-eminence, and that consequently the rules of International law are superior to those of Municipal law, and that municipal Courts must apply such rules even in cases in which they conflict with the rules of Municipal law. It will be necessary in the present short study only to consider the matter in its broader outlines, as the whole question has been elaborately dealt with in Mr. Cyril M. Picciotto's book,<sup>1</sup> which we propose to examine in detail before concluding our observations on the subject.

The matter of most concern to us is naturally the relation between International law and the law of England, and to this subject the greater part of the following remarks will be addressed. At the same time, a comparison of the attitude taken on this matter by the Courts of the Great American Republic cannot but afford interest to English lawyers, so that we shall add a short note on the way the

<sup>1</sup> *The Relation of International Law to the Law of England and the United States.* By Cyril M. Picciotto, with an Introduction by Professor Oppenheim, LL.D. London: McBride, Nast & Co., Ltd.

#### 448 INTERNATIONAL LAW AND THE LAW OF THE LAND

matter has been dealt with by the Legislatures and Courts of the United States.

Blackstone, writing in 1765, gave his opinion in the following words :—

"Since in England no royal power can introduce a new law or suspend the execution of the old, therefore the law of nations (wherever any question arises which is properly the subject of its jurisdiction) is here adopted in its full extent by the Common law, and is held to be a part of the law of the land. And those Acts of Parliament which have from time to time been made to enforce this universal law, or to facilitate the execution of its decisions, are not to be considered as indicative of any new rule, but merely as declaratory of the old fundamental constitution of the country, without which it must cease to be a part of the civilized world."<sup>1</sup>

How far Blackstone's views are accepted by the English Courts at the present day will be apparent from a comparison of the above extract with the judgment in *The West Rand Central Gold Mining Company v. Rex*, noticed below. Blackstone's assertion amounts to this: that International law is adopted to its full extent by the Common law and is part of the law of the land—a part of "the old fundamental constitution."

Sir Alexander Cockburn, in his judgment in the famous *Alabama* controversy, settled at Geneva in 1872, said :— "As Great Britain forms part of the fraternity of nations, the English Common law adopts the fundamental principles of International law and the obligations and duties they impose; so that it becomes, by force of the Municipal law, the duty of every man, so far as in him lies, to observe them, by reason of which any act done in contravention of such obligations becomes an offence against the laws of his country."<sup>2</sup>

The idea that International law is *per se* part of the English Common law is very prevalent. For example,

<sup>1</sup> Book IV, ch. 4.

<sup>2</sup> See Taylor, *International Law*, p. 88.

Scott accepts this view, and adds that, as part of the English Common law, International law—

"passed with the English colonists to America . . . when in consequence of a successful rebellion, they were admitted to the family of nations, the new republic recognised International law as completely as International law recognised the new republic. Municipal law it was in England, Municipal law it remained and is in the United States."<sup>1</sup>

In the case of *The Queen v. Keyn* (L. R. [1876], 2 Ex. D. 63), in the course of his judgment dissenting from the opinion on the point at issue of the majority of the Court, Lord Chief Justice Coleridge said :—

"The law of nations is that collection of usages which civilized States have agreed to observe in their dealings with one another. What these usages are, whether a particular one has or has not been agreed to, must be a matter of evidence. Treaties and acts of State are the evidence of the agreement of nations and do not in this country, at least *per se*, bind the tribunals. Neither certainly does a consensus of jurists; but it is evidence of the agreement of nations on international points: and on such points, when they arise, the English Courts give effect, as part of English law, to such agreements."

It will be seen that the learned judge here practically agrees with Blackstone's opinion, although he requires evidence to prove that the usages making up International law have been agreed on by civilised States. His remarks as to the position occupied by treaties are worth noticing.

The question as to the relation between International law and the law of England at the present day came before the Court in *The West Rand Central Gold Mining Company Limited v. Rex* (L. R. [1905], 2 K. B. 391), one of the contentions of the petitioners in that case being that International law constitutes a part of the Common law of England. Lord Alverstone, C.J. (in delivering the judgment

<sup>1</sup> *Cases on International Law*, p. v.

of himself and Wills and Kennedy, JJ.), dealt with this point by declaring that it is true that whatever had received the common assent of civilised nations must be taken to have received the assent of England; and that rules which had been so assented to might properly be called International law, and would in that character be acknowledged and applied by English municipal tribunals when occasion arose for them to decide questions to which International law might be relevant. But, in order to admit of this, such rules must be shown to be actually accepted as binding between nations, and the International law sought to be applied must, like anything else, be proved by satisfactory evidence, which must show either that the proposition put forward has been received and acted upon in English Courts, or that it was of such a nature, and had been so widely and generally accepted, that it could hardly be supposed that any civilised State would repudiate it. The mere opinion of jurists, however eminent, that it ought to be so received, would not in themselves suffice to show that a rule was binding. It must have received the express sanction of International agreement, or it must gradually have grown to be part of International law by frequent practical recognition in the dealings of States with each other. The statement, added his lordship, that International law forms part of the law of England ought therefore to be treated as correct only if this term is understood in the sense and subject to the limitations indicated.

From this it will be seen that the modern English view is that International law, before it can claim recognition by the Courts of this country, must be proved to have been previously received and acted on by English Courts, or else that the particular rule of International law in question must be shown to have been so generally accepted that it could not be supposed to have been repudiated by England as a civilised State.

The case of *Walker v. Baird and Another* (L. R. [1892], A. C. 491) may be cited as indirectly an authority for the proposition that, under the law of England, the Crown or the Executive, even when acting within its treaty-making power (except possibly in the case of treaties of peace), cannot divest or modify rights conferred by the ordinary law, and further, that International agreements entered into by this country with other States will not be regarded as part of the ordinary law of the land unless they have received the assent of the Legislature.<sup>1</sup>

"As International law is a law between States only and exclusively, treaties can have effect upon States only" (Oppenheim I, 562). In order to be binding upon subjects, Municipal law must take the appropriate steps to make them so binding. When an Act of Parliament is passed to render effectual the provisions of a treaty, the obligations of the treaty are obeyed by the subjects of the Crown, not because they are contained in a treaty, but because they are embodied in an Act of Parliament.<sup>2</sup>

Professor Westlake treated the whole subject at some length, basing his remarks on the decision of the Court in the case of *The West Rand Central Gold Mining Co. v. Rex (supra)*, and his essay will be found in the *Law Quarterly Review* for January, 1906. The conclusions to which this learned writer comes are expressed in the following words with which his essay closes:—

"The English Courts must enforce rights given by International law as well as those given by the law of the land in its narrower sense so far as they fall within their jurisdiction in respect of parties or places, subject to the rules that the King cannot divest or modify private rights by treaty (with the possible exception of treaties of peace), and that the Courts cannot question acts of State (or, in the present state of the authorities, draw consequences from them against the Crown).

<sup>1</sup> Cf. the position in the United States, *infra*.

<sup>2</sup> Cf. Maitland, *Constitutional History*, p. 424.

"The International law meant is that which at the time exists between States without prejudice to the right and duty of the Courts to assist in developing its acknowledged principles in the same manner in which they assist in developing the principles of the Common law."

"In many cases heard in the Prize Court since the outbreak of the present war, the Hague Conventions of 1907, an International treaty to which Great Britain was a party, have been recognised as binding in the English Courts,<sup>1</sup> and the Court of Appeal, in the case of *Porter v. Freudenberg* (L. R. [1914], 1 K. B.), discussed the effect of the Hague Convention upon the Laws and Customs of War on Land, Article 23 (h), on the law of England, arriving, it is true, at the conclusion that such article had no application to the matter under consideration, which was the right of an alien enemy to sue during the war. But the fact that the discussion of the point whether or no this particular article of the Convention had any effect upon this rule of English law shows clearly that the Court regarded the Hague Conventions as generally binding upon the Courts, doubtless on the ground of Great Britain's assent thereto, such assent forming evidence of its adoption according to the rule laid down in the case of *The West Rand Central Gold Mining Co. v. Rex (supra)*.

Now, it will at once be admitted that there are such vital differences between those customs and treaties which are known collectively as International law and the ordinary law of the land, which is called Municipal law, that it would be strange if International law always over-ruled Municipal law. Professor Oppenheim declares that their essential differences are found in (1) their sources, (2) the relations which they regulate, and (3) their substance.<sup>2</sup> He then points out that if International law differs in these respects

<sup>1</sup> *The Möwe* (L. R. [1915], 1, 1); *The Berlin* (L. R. [1914], P. 265).

<sup>2</sup> *International Law*, I, 25, 26.

from Municipal law, it cannot of itself be part of Municipal law, and further, that International law cannot *per se* alter or create Municipal law. According to his view, which appears to correctly represent English law at the present day, International law can only become part of the law of the land by being adopted into it either through custom or by Statute.<sup>1</sup> He adds:—

"Wherever and whenever such total or partial adoption has not taken place, municipal Courts cannot be considered to be bound by International law, because it has *per se* no power over municipal Courts, and if it happens that a rule of Municipal law is in indubitable conflict with a rule of the Law of Nations, municipal Courts must apply the former. If, on the other hand, a rule of the Law of Nations regulates a fact without conflicting with but without expressly or tacitly having been adopted by Municipal law, municipal Courts cannot apply such rule of the Law of Nations."<sup>2</sup>

English Courts, in interpreting and applying Municipal law, will seek to adopt such a construction as will not conflict with the Law of Nations, but of course cannot give effect to any rules of the Law of Nations which are inconsistent with the positive regulations of English law.<sup>3</sup> For instance, the English Courts enforced the British Orders in Council which were made in retaliation against Napoleon for his Berlin Decrees, although these Orders were scarcely defensible internationally.

In Mr. Picciotto's little volume, to which Professor Oppenheim contributes a luminous introduction, an attempt is made to remedy what hitherto has been a surprising *lacuna* in our legal literature. As Professor Oppenheim says in his Introduction:—

"The relations between International law and Municipal law, in spite of the great importance of the matter, have

<sup>1</sup> *International Law*, I, p. 26.

<sup>2</sup> *Ibid.* p. 27.

<sup>3</sup> Cf. the Scotch Case, *Mortensen v. Peters* [1906], 8 Fraser, 93. Cf. Lawrence, *Principles of International Law*, p. 478.

formerly never *ex professo* been enquired into. It may be said that it is only during the last twenty-five years that a few writers have given attention to this subject, and there is

- no unanimity amongst them with regard to it. . . . Whether or no the Municipal law of a certain State has, by custom or Statute, adopted the rule of International law *in toto* or *in parte* is a question of fact which can only be answered by a minute enquiry into the practice of the Courts and the legislation of each State."

As the Author points out in his Preface, the papers of Dr. Holland (*Studies in International Law*), of the late Dr. Westlake (in the *Law Quarterly Review*), and of Mr. J. B. Scott and Mr. W. W. Willoughby (in the *American Journal of International Law*), are practically the only English and American contributions on the subject, with the exception of occasional references in text-books dealing with International law generally.

In the volume under review one of the most outstanding virtues is that it is thoroughly up to date, mentioning cases decided in the Prize Court and the Court of Appeal since the commencement of the present war. Mr. Picciotto deals first with some of the general notions underlying the subject, examining such propositions as those which declare that International law is a law between States, while in matters of international concern Municipal law is the means of giving effect to the rules of International law. Mr. Picciotto deals also with the opinions of those jurists who have written on the relation between the two kinds of law, and points out the fundamental differences between them.

The writer then proceeds to deal with the subject, so far as it affects English law, under the following heads:

- (1) International Law in Courts of Prize and Admiralty;
- (2) International Law and Acts of Parliament in Ordinary Courts;
- (3) Treaties;
- (4) International Law and the Common Law.

(1) On the subject of International law and Prize Courts, to which he devotes a good deal of consideration, the Author first considers the opinions of Holland and Westlake on the position of Prize Courts in the legal economy, and then deals somewhat fully with the chief cases on the point, beginning with *The Maria* (1 Rob. 340), decided in 1799, in which Sir William Scott seemed to regard Prize Court jurisdiction as something distinct from that of an ordinary municipal Court, and himself as administering, not English law, but a kind of *jus gentium*, and ending with the case of *The Möwe* (31 T. L. R., 46), in which Sir Samuel Evans dealt with the present practice of the Prize Court. In addition, the Author cites the opinions of various publicists, including Phillimore, Westlake and Oppenheim, the latter of whom regards Prize Courts as applying the law of their own country and not International law. But, as the writer points out, the recent cases decided in the Prize Court "give a rather wider scope to International law, and declare in terms that it is the proper law of such a Court." And, indeed, in *The Marie Glaeser* (31 T. L. R., 8), in an *obiter dictum*, Sir Samuel Evans said, "This Court accordingly ought to, and will, regard the Declaration of Paris not only in the light of rules binding in the conduct of war, but as a recognised and acknowledged part of the Law of Nations, *which alone is the law this Court has to administer.*" On this it may be remarked that doubtless what the judge meant was that the Law of Nations is administered in the Prize Court, so far as it has been received into English law, according to the principles set out in *The West Rand Case* (*supra*). It cannot surely be contended that what he meant was that the Prize Court would administer the Law of Nations irrespective of the question whether any particular rule had been received into English law in the way described. In conclusion, the Author deals with the effect of conflicts between Orders in Council and

International law, and then closes with the proposition that "in spite of certain *dicta* to the contrary, an Act of Parliament, even though in conflict with International law, would to-day be regarded as binding upon the Court of Admiralty in its Prize, and *a fortiori* in its Instance, jurisdiction."

(2) With regard to the relation between International law and Acts of Parliament when questions involving such relation arise in ordinary Courts, as Mr. Picciotto shows, "it is for the Court to enforce an Act of Parliament, however outrageous it may seem, or however repugnant to the plainest rules of International law." Mr. Picciotto regards the matter as free from doubt and deals with this portion of his subject more briefly.

(3) The work contains a very instructive chapter on the place which treaties occupy in relation to English and American law, and, "so far as English law is concerned," the matter is regarded as "not entirely free from doubt." In Germany and the United States the matter is comparatively simple. The writer deals with such matters as the ratification of treaties, the claims of the Crown to bind subjects by treaty and the cases and opinions thereon, Acts of Parliament rendering treaties effective, and in this connection the chapter contains some pertinent remarks on the question "whether the Declaration of London would have required an Act of Parliament in order to make it binding on all our Courts," the writer concluding that since the Declaration, as an unratified agreement, is in any event not binding, yet the Order in Council, incorporating its main provisions, are of authority as *Municipal Law* in Courts of Prize. The writer ends this chapter with a consideration of the judgment of the full Court of Appeal, in *Porter v. Freudenberg* (*supra*), on the effect of 23 (h) of the Hague Convention IV on the disability of alien enemies in an English Court.

(4) According to Mr. Picciotto "the most difficult branch of the enquiry" is that which concerns the relation between International law and the Common law. He shows that to lawyers of the eighteenth century the Common law was the expression of principles of "natural justice," and, as such, superior to an Act of Parliament which was repugnant to those principles; and further, that according to the view of these lawyers, "since International law rests upon rules of true morality, and since the Common law is the embodiment of such rules, International law must be part of the Common law." The writer then traces the history of the matter as revealed in statutes, cases, and the opinions of writers, and finally shows that the judgment of the Court, in the *locus classicus* the case of *The West Rand Central Gold Mining Co. v. Rex*, accepts the position that International law is part of the Common law in its full extent only with many safeguards and subject to careful limitations as shown above.

The Author's conclusion (p. 106) on the relation of International law to the Common law is that "International law is a material source of Common law in the sense that rules derived thence find their way into it, just as the rules of local custom find their way into it, and become after their adoption a living part of it," and his proposition appears to state concisely the gist of the judgment on this point in *The West Rand Case*.

Dealing with the important question as to the immunity accorded to diplomatic agents by International law and those accorded to them by 7 Anne, c. 12, the writer discusses the question whether this includes immunity from criminal liability, and after an examination of the scanty authority on the point, he finally submits that "diplomatic envoys have no immunity from the criminal jurisdiction of this country given them by the Act of Anne," but that possibly they have immunity by rules of International la

embodied in the Common law, at any rate in summary proceedings.

It is somewhat difficult to reconcile the undoubted truism (p. 23) that an Act of Parliament cannot be illegal and is *ex hypothesis* law, and that "all that a Court may do is to administer and interpret it according to well-recognised and scientific canons of construction," the statement (p. 47) that an Act of Parliament, even though in conflict with International law, would be regarded as binding upon the Prize Court, the conclusion arrived at (p. 51), after a detailed examination of the cases, that "it is for the Court to enforce an Act of Parliament, however outrageous it may seem or however repugnant to the plainest rules of International law," with the Author's conclusion (p. 125) that an Act of Parliament is *almost* certainly binding on Courts of Prize in England, although it is in conflict with International law.

The general conclusions which we may draw as to the relations of International law to the law of England may be summarised under four heads as follows:—

(1) International law may have been adopted into English law so as to form an integral part of it in the manner described in the judgment in *The West Rand Central Gold Mining Co. v. Rex (supra)*, e.g., by custom or by statute.<sup>1</sup> In such a case, the rules of International law so adopted are enforced by the English Courts, not as International law, but as part of the law of England.

(2) International law may conflict with English law. In such a case, although there may be an international liability on the State for its failure to fulfil its international duties, yet English Courts must apply their own law and cannot apply those rules of International law which have not been adopted.<sup>2</sup>

<sup>1</sup> Cf. The Statute, 7 Anne, ch. 12: *Triquet v. Bath*, 5 Burrow (1478).

<sup>2</sup> Cf. Holland, *Studies in International Law*, p. 196.

(3) There may be no actual conflict between the rules of International law and those of English law, but there may be a gap in English law so far as the particular matter under discussion is concerned. In such a case, it is submitted that, on principle, as the particular rules of International law have not been adopted into English law, English Courts cannot apply such rules.

(4) All Acts of Parliament and Orders in Council will be construed with the presumption that no violation of International law is intended.<sup>1</sup>

We now turn for a brief glance as to the place of International law in the law of the United States, and here, as Mr. Picciotto observes, the matter "is defined with a rather greater exactness than it is in English law." But, as Mr. Picciotto also points out, just as the doctrine that "International law is part of the law of England" is, as a proposition, neither wholly true nor wholly false, and can be received only with considerable modification, so we must equally beware of making any such sweeping statement in the case of the law of the United States. The Author deals with this branch of his subject somewhat more briefly than with the relation of International law to the law of England, but he treats the matter very clearly, and states the main principles with accuracy. The conclusion to which he comes (p. 126), that an Act of Congress over-rules customary International law, and that customary International law until so over-ruled is recognised by the Courts, is, undoubtedly, correct as an exposition of the existing law based on *Foster v. Neilson* ([1829], 2 Pet. 254), and *The Nereide* ([1815], 9 Cranch. 423).

In the case of *The Paquete Habana* and *The Lola* ([1899], 175 U. S. 677), one of the questions before the Supreme Court of the United States was whether the Law of Nations forms part of the Municipal law of the United States. It

<sup>1</sup> Cf. Picciotto, p. 126.

was held that it did, and must be ascertained and administered by Courts of Justice of appropriate jurisdiction as often as any question of right depending on it presented itself for determination. Mr. Justice Gray delivered the judgment of the majority of the Court, and in the course of his judgment said, "International law is part of our law and must be ascertained and administered by the Courts of Justice of proper jurisdiction as often as questions of right depending upon it are duly presented for their determination. For this purpose, where there is no treaty and no controlling executive or legislative Act or judicial decision, resort must be had to the customs and usages of civilised nations, and as evidence of these to the works of jurists and commentators." Again, *The Nereide* ([1815], 9 Cranch, 388, 423), Chief Justice Marshall said, "The Court is bound by the Law of Nations, which is part of the law of the land."

We have seen that the Supreme Court of the United States has, in the case of *The Paquete Habana*, held that International law is part of the law of the United States. So far as treaties made with other States are concerned, it is laid down by Article 6 of the Constitution that "all treaties made or which shall be made, under the authority of the United States, shall be the supreme law of the land." It should be remembered that the power of making treaties, which is vested in the President, can only be exercised provided two-thirds of the Senators present concur. This provision certainly provides that all treaties, if duly made, will be recognised and enforced by the judicial power if they fall within its cognisance, and, as remarked by Mr. Justice Chase in *Ware v. Hylton* (3 Dall, p. 236), a treaty being the law of the United States, over-rides any Act of any local Legislature:—

"A treaty is in its nature a contract between two nations. . . . It does not generally affect of itself the object to be accomplished . . . but it is carried into execution by the

Sovereign power of the respective parties. In the United States a different principle is established. Our constitution declares a treaty to be the law of the land. It is consequently to be regarded in Courts of justice as an equivalent to an act of the Legislature, whenever it operates of itself without the aid of any legislative provision. But when the terms of the stipulation import a contract, when either party engages to perform a particular Act, the treaty addresses itself to the political, not to the judicial, department, and the Legislature must execute the contract before it can become a rule of the Court."

Mr. Picciotto quotes the case<sup>1</sup> above referred to, among others, in support of his proposition that treaties are placed by the American Constitution on a level with Acts of Congress (p. 113). It should be noted, however, that the power of the Courts to thus enforce treaties as part of the law of the United States is subject to the action of the Legislature, which may pass laws depriving the treaties of any force within the United States, although they remain internationally valid.<sup>2</sup> Mr. Picciotto deals at some length with the relation between treaties and Acts of Congress, and reaches the conclusion (p. 126) that, as a consequence of a treaty being part of the law of the land, and on the same level as an Act of Congress, "an earlier Act of Congress may be over-ruled by a later treaty, and an earlier treaty by an Act of Congress."

As already stated, a treaty being embodied in the law of the United States over-rides any act of any local Legislature. On this subject the words of Chief Justice Marshall should be observed, in *Murray v. The Charming Betsy* ([1804], 2 Cranch, 118), "An Act of Congress ought never to be construed to violate the Law of Nations if any other possible construction remains."

Apart from the question of treaties being accepted as part of the law of the land subject to the limitations already

<sup>1</sup> *Foster v. Neilson*, 2 Pet. 254.

<sup>2</sup> Cf. *Whitney v. Robertson* ([1887], 124 V. S.).

noticed, it is submitted that, despite Mr. Justice Gray's declaration cited above, the position in the United States with reference to the relation between the ordinary Municipal law and International law is much the same as it is in England, and Mr. Picciotto appears to reach the same conclusion although expressing it in somewhat different language (p. 124).

We are pleased to observe that Mr. Picciotto discusses the conflict between International law and the Municipal law of the United States which arose in connection with the controversy between Great Britain and the United States over the Panama Canal, this being another example of the up-to-dateness of the volume (if we may be permitted to use such an expression).

A careful examination of Mr. Picciotto's work leads to the conclusion that Professor Oppenheim is right in saying that, "by inquiring separately into the relations of International law to the Prize law, the Statutory law and the Common law, he has pursued the right method," and further, that the Author's "attempt to answer a question of some difficulty, partly of International and partly of Constitutional law" as to the relation between International law and the law of England and the United States has been eminently successful; and that (as Professor Oppenheim says in his Introduction) the results of Mr. Picciotto's inquiry represent, on the whole, the true relation. We think that the Author is to be congratulated upon the production of a volume which fills an undoubted gap in legal literature. In particular, those portions of the work which deal with the relation of International law to Prize law and to the Common law are particularly worthy of commendation, as forming a fairly full summary of the history and present position of the intricate subjects with which they deal. We should like to have seen a slightly more detailed examination of recent Prize Court judgments; and as the

book professes to deal also with the relation of International law to the law of the United States, we think a fuller examination of this part of the subject would have been appropriate, but, as we have already said, in the sixteen pages which the Author devotes to American authorities, all the main principles are dealt with."

W. E. WILKINSON.

#### V.—SUBMARINE PIRACY.

SINCE the declaration of her Paper Blockade on the 18th February last, Germany has exacted, in the case of 95 merchant vessels and 144 steam trawlers, the penalty for the breach of such blockade of the total or attempted destruction of the vessel and all on board. As a consequence, nearly 2,000 non-combatants have lost their lives by the dastardly excesses of a maritime belligerent that appear to be without a parallel in history. The scenes of horror at the siege of Magdeburg, for which Schiller, the Shakespeare of Germany, declared "history has no language and poetry no pencil," were instances of the excesses of a belligerent in land warfare.

In the language of Mr. Asquith, the action of the officers and crews of German submarines has substituted "indiscriminate destruction for regulated capture"; a communiqué of the Foreign Office declared that the enemy had embarked on a campaign of "open piracy and murder"; and the Board of Admiralty declared that the officers and crews of German submarines who might be captured would be refused the honours of war<sup>1</sup>; and Sir Edward Carson, A.-G., in his statement at the opening of the *Lusitania* enquiry declared

<sup>1</sup> For what appears in principle to be a direct precedent for this action of the British Admiralty, see *1 Hallock's Int. Law*, p. 624.

that to have sunk that unarmed vessel without notice, involving the sacrifice of over a thousand lives, was a deliberate attempt to murder in the eyes of our law.<sup>1</sup> Though the isolation of submarine crews has been abandoned, and there is now conceded a substantial and identical treatment of German submarine prisoners and other prisoners of war, the statement of Mr. Balfour in the House of Commons, after he had joined the present Coalition Government, distinctly shows that there is no change of opinion between the views of the late and present Governments as to the character of the acts in which the submarine prisoners have been concerned,<sup>2</sup> nor could there be, in view of the great offence, to use the language of Professor Holland, that has been committed against the public law of Europe.<sup>3</sup>

It may be preliminarily observed that when Napoleon instituted a Paper Blockade of the British Isles in 1806, he did not propose to enforce it by the murder of non-combatants, though, at the time, Napoleon was exceedingly bitter against this country, and, in an address to the merchants of Hamburg, who represented to him that his Berlin Decree would ruin their commerce, declared that his object was to ruin English commerce, and that, to secure that end, he was indifferent if matters reverted to the 4th century, and contract was replaced by barter. Yet, so far from Napoleon enforcing his terrible policy by the murder of non-combatants, he declared at the time that his policy was directed to secure the lives of non-combatants at sea, and to procure the immunity of all private property at sea. It will remain an overbearing feature of this great war that it has made a fictitious or Paper Blockade, always objectionable, a disfigurement alike to public law and the majestic structure of a common humanity. No doubt the officers

<sup>1</sup> *The Times*, June 16th.

<sup>2</sup> *Ibid.* July 9th.

<sup>3</sup> *Ibid.* March 15th and March 23rd.

and crews of German submarines have behaved on some occasions even with conspicuous humanity. But it is not merely difficult, but impossible, to see how this excuses their action on such occasions as the sinking of the *Oriole*, *Tangistan*, *Falaba*, *Aguila* and *Lusitania*.

It is a curious reflection that, though the Declaration of London, 1909, by Article 48 and succeeding clauses, authorises, *sub modo*, the destruction of even neutral prizes (with a strict reservation of the safety of all on board), it is very difficult to conclude that Germany can, consistently with her policy during the Russo-Japanese War, act under Chapter IV of the Declaration of London, even to the extent only of sinking the ship, after having provided for the safety of all on board. The Declaration of London has never been ratified, and it consecrates for the first time in the history of Maritime law the destruction of neutral prizes. Further, during the Russo-Japanese War, Germany, then of course neutral, demanded and obtained from Russia compensation for the destruction of the German ship *Thea*. The point, whether Germany may not legitimately sink British merchant vessels, not having neutral goods on board, falls as soon as it is mentioned in the present state of International law. It is contrary to the Declaration of Paris, 1856, to confiscate neutral goods on an enemy ship, and, therefore, *a fortiori*, they ought not to be destroyed. But, as the usage of sinking neutral prizes conditionally has crept in, largely owing to Russian influence, it is idle to discuss the question whether a belligerent cruiser may legitimately destroy an enemy merchant vessel not carrying goods of a neutral. But, to use the language of the Prime Minister, it is nothing less than "assassination" to sacrifice non-combatant lives in the process of destroying a prize. With the exception of a wild rumour current, but speedily exploded, in the Spanish-American War of 1898, the history of war in modern times, since the Italian sea-codes of the

Middle Ages, affords no trace of the total destruction of a ship and all on board being recognised as a lawful penalty for the breach of blockade.

The stern reprobation of the Government of this country at this great offence against public law, perpetrated by the foe within the immemorial jurisdiction of the King's Chambers, has been as continuous in fact as it is juristically consistent.

There was a brilliant symposium of expert opinion in *The Times* on the issue, whether the officers and crews of German submarines who had torpedoed ships without notice, and had sacrificed civilian lives in the process, could, if taken prisoners, be put on their trial as murderers or pirates. In spite of the announcements of the Board of the Admiralty and the Foreign Office communiqués, and the declarations of Ministers (the speech of Mr. Churchill in the House of Commons on February 16th may be specially referred to in this connection), it must be nevertheless admitted that the weight of authority in the symposium, initiated in March by Mr. Frederic Harrison, was against the propriety of indicting the officers and crews of the German submarines as either pirates or murderers. But there was a strange *lacuna* in the discussion in *The Times* on what appears to be substantially decisive, the bearing of the arbitral award at Geneva, 1871, by which the public vessels of a recognised belligerent were declared to have committed an offence both against International law and the Criminal law of England, on the subject. There were also, it is submitted, great misconceptions as to the extent of the Admiralty jurisdiction in the case of piracy and murder on the high seas.

For the following conclusive reasons, the authorities for which will be alluded to, it is submitted that it is right in point of law that the officers and crews of German submarines should be put on their trial for either murder or

piracy. In the ensuing sentences the matter is discussed purely from a juridical point. Matters of sentiment, and even the question of reprisals, may be at once dismissed. As regards the last point, the course was adopted by Professor T. E. Holland in the columns of *The Times*.

An analysis of the five contributions to *The Times*, written more or less from a purely juridical point, reveals that, substantially, the objections to placing German submarine officers and crews on their trial as pirates or murderers resolved themselves into the objection that a public vessel cannot be treated as a pirate unless it abrogates its allegiance or is disowned by the Government of the State to which it belongs. Unless these qualifications enter into the matter (they obviously do not as regards the German submarines), the acts of a public vessel are presumed to be done under the authority of the State, and the only redress for its excesses is an appeal to that quarter. Yet, will it be believed, that this very argument was displayed by Great Britain in the *Alabama* controversy, and therefore history has indeed taught us little if we can infer anything as to its reliability? The circumstance fully appears from a reference to the printed case of the United States at Geneva (p. 205). The principal authority for the position that the acts of a public vessel are presumed to be done under the authority of the State, and that, consequently, it cannot be treated as a pirate, is probably a passage in Hall's *International Law*. The principle is there admitted to be subject to exceptions, but the case of the Confederate cruisers clearly introduces another exception which ought to be categorically set out in that work, but this is not done. A principle that is admittedly subject to three conspicuous exceptions is in the impaired position of a principle, of which it may be said, in the words of Lord Campbell, that "the exceptions eat up the rule." The fact that the issue, whether a public vessel can commit an offence both against International

law and the Criminal law of a third State (a pirate can do no more), was decided at Geneva as between a neutral and a belligerent, and not between two belligerents after a war, makes no difference. The fact that the Confederacy was a recognised belligerent (before it had a ship of war on the seas), and that the *Alabama* and other Confederate cruisers were all commissioned ships of war or public vessels is, of course, indisputable, and was not in controversy at the time.

It would involve refurbishing rusty weapons of controversy to decide the question whether the *Alabama* was a pirate. The fact remains that the United States was the successful litigant at Geneva, the most important arbitral tribunal ever convened, and that, throughout the Civil War, the Federal Secretaries of State, and the diplomatic representatives of the United States in two hemispheres, consistently applied the term pirate to the *Alabama*. In his last diplomatic letter, Mr. Fish wrote to Mr. Motley, American Ambassador to the Court of St. James:—"Our merchant vessels were destroyed piratically by captors who had no port of their own."

The truth probably is that the case was very near the line. In the then state of International law, there was little or no authority for the position that it was a legitimate act of war for a belligerent to destroy his prizes at sea, even if he was careful not to sacrifice life in the process, as the *Alabama* always was. Strictly speaking, in 1861-4, there was no authority for a belligerent destroying neutral prizes. But there were two decisions of Lord Stowell, that probably turn on the very exceptional circumstances of the case, that a belligerent might destroy enemy ships carrying food. The question whether the Confederate cruisers were pirates may be dismissed. It is not merely a proper, but the only possible rendering of the arbitral award at Geneva (so far as it is relevant to the submarine question), that it decided that

the public vessel of a recognised belligerent State might commit an offence both against International law and the Criminal law of a neutral State. The United States would never have prosecuted their case before the tribunal at Geneva if they had not maintained that the building and dispatch of the *Alabama* constituted an infraction of the Foreign Enlistment Act 1819. But to contend that the acts of a public vessel cannot amount to piracy because they are presumed to be done under the authority of the State, and that criminal responsibility may nevertheless be incurred by officers and crews before the Courts of other States for the acts of the vessel, are two mutually exclusive and contradictory propositions. Both propositions cannot be false, but both cannot be true, one or other must go. From the point of view of usage, the case is unanswerable; and it is hardly possible to insist on the position that the Geneva arbitral tribunal did not substantially declare the Confederate cruisers were pirates. But if so, the point that the acts of a public vessel cannot be treated as piracy because they are presumed to be done under the authority of the State, to use an expression of Lord Denman, falls as soon as it is mentioned, and cannot be relied upon as an irrebuttable plea to the jurisdiction in the case of the officers and crews of German submarines who torpedo a merchant ship and all on board without notice. It is an ultimate postulate of all the learning about the Treaty of Washington and the arbitral tribunal at Geneva that a public vessel of a belligerent is not punishable by the municipal Criminal law of another State. But that being once conceded, it equally follows that, in a proper case, she is punishable as a pirate by the law of another State, where there is no question of her having evidently thrown off her allegiance to the State under circumstances which prevent her from being looked upon as the instrument of another politically organised

community, or unless, under like circumstances, she has been declared to be piratical by the legitimate Government. It bears upon the subject that the debates at the Hague in 1899 and 1907 show that prisoners of war are criminally responsible for Common law offences, even after the conclusion of the peace.<sup>1</sup>

Next, it is proposed to examine, exclusively from the point of view of the Criminal law of England, the criminal responsibility of officers and crews of the German submarines who have torpedoed British merchant vessels without notice.

Criminal responsibility, for this purpose, means either criminal responsibility for murder or else for piracy. As to murder, it has been observed in the columns of *The Times* that it is practically certain that the officers of German submarines who have torpedoed a British merchant ship without notice, when that act was accompanied with loss of life, have not murdered anyone within the jurisdiction of the Central Criminal Court, *i.e.*, in England, or within three miles of the coast.

It seems both a reasonable and fair explanation of this conclusion of Sir Herbert Stephen, that he considers that criminal venue is determined by the *locus in quo* of the offender, and not by that of the offence. But the contrary is too clear to admit of dispute. It is a doctrine, founded on a convenient fiction, that a crime must, for the purpose of determining the venue, be held to have been committed on an English ship where the death occurred. When a person being in one jurisdiction fires a shot at a person who is in another, it may well be that the blow struck by the bullet is an act done in the jurisdiction in which the bullet takes effect. The question was specifically raised for adjudication at a time when there were still some relict remaining of the conflict between the ancient jurisdiction of the Admiral of England and that of the ordinary Courts. It

<sup>1</sup> Westlake, *Int. Law*, Part II : War.

appeared in evidence at a trial for murder that the accused, from a point on land 200 yards from the shore, killed the deceased who was in a boat about 100 yards from the shore; and it was held by the judges that the accused was rightly tried by the Admiralty Jurisdiction, because the offence is committed where the death happens, and not at the place from whence the cause of the death proceeds.<sup>1</sup>

Therefore, according to the technical criminal rules of venue, persons on an unarmed British merchant ship which is torpedoed or shelled without warning by a German submarine who are shot or drowned are persons murdered on a British ship, and the offence is clearly committed within the jurisdiction of the Common law of England.

Next, as to piracy. It was urged in the columns of *The Times*, on the 11th March, 1915, that "piracy is not, in itself, a capital offence." Here, again, the contrary is too clear to admit of dispute. Piracy is felony by the Civil law (not by the Common law)<sup>2</sup>; and, when accompanied with violence, it is punishable by Statute (7 Will. IV and 1 Vict., c. 88, s. 2 (1837)) with death.

By the laws of most States, piracy is punishable by death, and Lord Stowell observed, in *The Le Louis* (2 Dodson's Adm. Rep., 244, 246), that pirates are "universally subject to the extreme rights of war." This dictum of Lord Stowell somewhat impairs the conclusion of Sir Herbert Stephen in *The Times*, on the 11th March, 1915, that all definitions of piracy in English law have referred to matters occurring during peace.

A cursory reference to the Piracy Act 1837, by which an assault with intent to commit piracy is made a capital offence, shows that it contains none of the limitations suggested. The Statute nowhere states that only the

<sup>1</sup> *Russell on Crimes*, Ed. 1909, p. 33, referring to the language of Cockburn, C.J., in *R. v. Kyn*, 2 Ex. Div., p. 234; and see *R. v. Coombes*, 1 Leach, 388 (1785). <sup>2</sup> *Phillimore, International Law*, s. 350, p. 388.

members of the crews of a private armed vessel can be indicted for piracy. No clause exempts the officers and crews of the public vessels of a foreign State, whether at war or in amity with this country, from criminal responsibility for piracy. In the important case of the Magellan Pirates, Dr. Stephen Lushington, then Judge of the Admiralty Court (1851), observed that "in the administration of our Criminal law, generally speaking, all persons are held to be pirates who are found guilty of piratical acts, and piratical acts are robbery and murder upon the high seas."<sup>1</sup> The language of Lord Mersey, in the *Falaba* enquiry, shows that an indictment for piracy is certainly appropriate to the case of the officers of German submarines who indiscriminately destroy unarmed merchant vessels and sacrifice human life. Lord Mersey is reported to have said that he was driven to the conclusion that the captain of the submarine desired and designed, not merely to sink the ship, but, in doing so, also to sacrifice the lives of the passengers.<sup>2</sup> A reference to the report of the contemporaneous Commission on the Criminal law,<sup>3</sup> and to a note in the succeeding editions of *The Life of Romilly*,<sup>4</sup> shows that the intention of the Piracy Act 1837 was to punish piracy capitally only when committed *animo occidendi* (not *animo furandi*); in other words, only when it was accompanied with actual injury to the person, or acts endangering human life. It passes the wit of man to see how piracy can be committed without an assault; and, therefore, the effect is, that piracy is made a capital offence in all cases by the Act of 1837.

N. W. SIBLEY.

<sup>1</sup> 1 Phill., *Int. Law*, sect. 357, p. 392.

<sup>2</sup> *The Times*, July 9th, 1915; and see Lord Mersey's findings in the *Lusitania* Case. *The Times*, July 19th, 1915.

<sup>3</sup> Second Rep. from the Commissioners on the Criminal Law; Parl. Paper, 1836: Cd. 343, p. 32.

<sup>4</sup> *Life of Sir Samuel Romilly*, Vol. 3, 337 n (1818).

## VI.—CURRENT NOTES ON INTERNATIONAL LAW.

### Destruction of Neutral Shipping.

ONE of the most disquieting signs of the times is the submissiveness of the most powerful neutrals in face of extraordinary interferences on the part of belligerents. Can anyone suppose that if a British ship had been sent to the bottom by a Federal at the time of the *Trent* affair, Anglo-American relations would not have been in a blaze? Can anyone imagine the American flag being submerged by a German in the war of 1870 without the most serious consequences? Yet the *W. P. Frye* was sunk by a German the other day, and the perpetrator of the atrocity was received with calm hospitality in an American port. Instead of a flaming demand passing through the country that every American ship should be safe from violent destruction everywhere on the high seas, there is a tame request to Berlin for—the value of the hull and freight! Not a cent for the insult to the flag. Not a dollar for the interruption to the safety of American ships as carriers of Allies' goods under the Declaration of Paris. Not a word of apology or promise for the future. It is very remarkable. Probably more real appreciation of the menace to neutral shipping was shown by the Dutch, who have taken the destruction of the *Medea* and the *Katwyk* very seriously, as an invasion of the inviolable rights of Her Netherland Majesty's flag. Norwegian ships and a Greek ship have also been sunk by Germans. The curious thing is that all this is the completest novelty. Whether or not the doctrine of ex-territoriality was accepted, the fact was that neutral vessels never have been destroyed in this way throughout modern history. It has been customary of late to decry the value and reason of the doctrine of

ex-territoriality, whether in the case of ambassadors or of merchant vessels, and to represent it as a fiction, valuable only as a striking metaphor. The present occurrences show that metaphors cannot be too striking to secure respect for the ideas they embody. So long as the ship was regarded as "a floating portion of territory," so long would these violent brutalities have been impossible. They would at once have touched the national sense of self-respect. That the United States should be satisfied to have all their mercantile marine destroyed, on payment of the value of the hulls and freight, is surely a deplorable admission. A strong naval power could clearly, under colour of exercising its warlike rights, use this novel power to ruin its neutral rivals. Germany has actually invited the United States to wait and see whether the *W. P. Frye* may not be condemned *ex post facto* by a German Prize Court. This may be according to the Declaration of London, but it is not according to common sense or national self-respect.

---

### Trading with the Enemy: Penal Aspect.

Mr. Wechster was more lucky than Mr. Oppenheimer. He wrote on behalf of the Yüst Typewriter Co., Ltd., to its Stockholm agent that he had no objection to certain typewriter pads being supplied to the Company at Stockholm, from a firm at Berlin which owed the Company money. An application for a licence was pending, but had not actually been granted. Certainly, the supply of goods to a branch in a neutral country is not a "trading with the enemy" in the International law sense; nor is the relief of an enemy from his indebtedness. Such acts, however, clearly appear to come within the penalties of the Trading with the Enemy Act and proclamations. Mr. Wechster had to pay £10. But Mr. Oppenheimer got two months and had to pay crushing costs, for simply getting his own

lithographic transfers away from Germany. It was argued that the proclamations only applied to dealings by way of trade—but the Court of Criminal Appeal extended these highly penal provisions to all obtaining of goods from Germany, whether one's own or not. It is common learning that, to enable seizure of goods as prize, it is not necessary to establish the fact of trade in the commercial sense (*The Rapid*)<sup>1</sup>, but it is an extremely harsh measure to make the recovery of one's own goods a matter for two months' jail.

The recent proceedings<sup>2</sup> against iron merchants who were sentenced to imprisonment on a charge of supplying ore to German buyers—indeed, to Messrs. Krupp—induces mixed reflections. The procedure was in substance lenient, because it is highly probable that to afford assistance to the King's enemies in arms amounts to high treason. At any rate—this is so in England, where it has been held that when the Statute of Treasons speaks of giving the King's enemies aid and comfort within the realm, it also means giving it them outside.<sup>3</sup> It is, perhaps, possible that so singular a construction, adopted as it was by Viscount Alverstone on somewhat uncritical grounds, would not be followed in so logical a part of the country as Edinburgh; and the Court of Justiciary cannot be controlled by the House of Lords. On the other hand, the inconvenience of a divergence in the interpretation of the law of treason, which the Act of Union stipulated should be alike in the two Kingdoms, would be such that the Scots Courts would scarcely be likely to interpret the Statute differently from the King's Bench Division in London. While, however, the procedure adopted was lenient in substance, in form it took the unfortunate shape of invoking a retrospective Statute, which *ex post facto*

<sup>1</sup> 8 Cranch, 155.

<sup>2</sup> *L.-A. v. Hetherington and Wilson* ([1915], 2 S. L. T. 90).

<sup>3</sup> *R. v. Lynch* [L. R. 1903], 1 K. B. 444.

penalised what no one could have supposed to be so highly criminal. No precedent of a conviction or indictment for trading in innocent articles with the enemy's country can be produced, although *dicta* as to its criminality are forthcoming both for and against, and are quite inconclusive. In "*De La Motte*" (2 How. St. Tr. 770) nothing is said as to the criminality of any but contraband trade with the enemy—and even that is represented as venial. One can understand such trading being made criminal; but scarcely its being made so retrospectively.

The result is, that a principle which was thought to be somewhat harsh and sweeping in its original application—which took the form of the confiscation of tangible goods going to or coming from the enemy's country—is applied far beyond the narrow limits of that original scope, and in an *ex post facto* manner which, in less dangerous times, would be very difficult to sustain. In the result, substantial justice is done, but by the scarcely satisfactory process of visiting a grave offence with the novel and perhaps too sweeping penalties of a retrospective Statute.

---

### Enemy Shareholders.

It has been decided by the Court of Appeal in *Robson v. Premier Oil and Pipe Line Co., Ltd.*,<sup>1</sup> that an enemy shareholder may not vote at a meeting of shareholders in a British company. The consequence follows that a British company, by its British shareholders and managers can, uncontrolled, play ducks and drakes with the money of their enemy colleagues. Unless we are in favour of the confiscation of private enemy property (which is another question, and might well be considered a practical one), the inequality of this is patent. Why should foreign shareholders, any more than foreign partners, be bound by the acts of

<sup>1</sup> L. R. [1915], 2 Ch. 124.

persons whom they can no longer control? In cases where the shares are not fully paid up, or where the enemy holding is deferred security, the injustice is still more glaring. Either we should candidly admit that enemy property can be confiscated, or we ought to remove it from the possibility of informal private confiscation. The right course would be to reconstruct. The holding of the enemy ought to be put beyond the risk of fluctuation. If that is thought too heroic a remedy—and no doubt Mr. Registrar Manson's Court would find its resources severely taxed—then the Crown should *pro forma* confiscate the shares, and should appoint some neutral person (not the Official Controller of Companies, whose duty it is to regard primarily the national interests), such as a Swiss or American bank of high standing, to take them over for the protection of the dispossessed enemies. In *The Poona (Cargo ex) Case* (3rd May, 1915) the President of the Admiralty Division declined to regard a British registered company as anything but British, though composed of alien enemies. He followed the much-canvassed decision in *Continental Tyre Co. v. Daimler*, which Lord Halsbury has (acting on a suggestion of our leading company lawyers, Lords Lindley and Wrenbury) introduced a bill to over-rule.

### Combatants and Non-Combatants.

As the civil population, however, becomes more and more involved in the direct conduct of the war, it seems much more likely that the tendency will be to confiscate private property belonging to the enemy. Under the latest system, whereby private individuals are detained and not permitted to leave the country, even for neutral destinations, and under which the receipt of dividends by persons in enemy countries is firmly controlled, we have something very like a temporary confiscation of enemy property. And

no war-confiscation can be other than temporary; because permanent confiscations will always form the subject of discussion when the terms of peace are negotiated.

Both at sea and on land the dividing line between the combatant and the non-combatant is becoming blurred. Every citizen is an actual or a potential member of the Army Ordnance Corps. Every merchantman is an actual or potential scout or ram. The protection promised to the invaded populace, on condition of their remaining quiet, has proved illusory. The peaceful dweller at the seaside finds the proximity of a signal station or a railway line draws down on his villa a rain of naval shells. It seems really probable that the theoretical immunity of private property from confiscation, which in Napoleon's time Lord Ellenborough thought so unassailable (*in Wolff v. Oxholm*), will not much longer be maintained.

But it is curious to reflect that, for all that, the nation in arms is nothing new. Revolutionary and Imperial France was a nation in arms. The Germany of 1814 was a nation in arms; and if ever there was a nation in arms at all, it was the Spain of 1808. Yet that was the very era in which the principle laid down by Franklin and Rousseau was adopted, that war is a struggle between armed forces, which ought not to involve civilians.

The British attempt to intercept provisions destined for France in 1793, on the ground that France could only be brought to terms by creating distress among its civil population, was resisted not only by America, but by Denmark. Under Jay's Treaty of 1794, Great Britain paid damages for the seizures of American goods made in the prosecution of the attempt.<sup>1</sup> Woolsey's remark has always seemed sensible, that a nation which arms the bulk of its population—as the British asserted France had done—would be reduced to famine by the operation of the laws of political economy,

<sup>1</sup> De Martens, *Causes Célèbres*, v.

without the need for any special interference on the part of its enemy. In fact, the *quasi* siege warfare of modern days must result in the strain on civil supply being too great. The swollen armies in the trenches must sooner or later be depleted for the service of the factories and the fields. And in such a prolonged contest, that nation will be likely to succeed which has the most perfect and reliable civil basis at home for its operations at the front. When this is recognised, it will be difficult to maintain the immunities of civilians in their entirety.

#### Fi. Fa. stopped by Licence.

The Disconto-Gesellschaft is a German bank with a head office in Berlin and an office in London. When war broke out Messrs. Leader, solicitors in London, had a balance of £247 at the Berlin headquarters. They commenced proceedings in England to recover it, and served the bank through its head office in London under the ordinary rules. The bank was then licensed to carry on business in London, but to a very strictly limited extent. It was held in *Leader v. Disconto-Gesellschaft* (3rd June, 1915), reversing Ridley, J., that the payment of Messrs. Leader's debt did not come within these limits, and that consequently they could not enforce execution against the bank's assets.

The original transaction of deposit had nothing whatever to do with the London agency of the Gesellschaft, and the licence was limited to carrying through "transactions which in ordinary course would have been carried out through or with the London establishment."

It seems to be going too far to hold that the restricted terms of the licence prevented execution. The London agents of the bank might not lawfully apply the bank's assets in particular ways—but it is extremely difficult to see how this could prevent British subjects (unless and until

its property had been forfeited to the Crown) from proceeding to exercise their Common-law rights against those assets. Surely it is not "trading with the enemy" to levy execution upon him!

---

### Requisition *pendente lite*—*The Zamora*.

The bewildering rapidity with which statutory rules and orders are from time to time altered is exemplified in the instance of the requisitioning of goods brought within the prize jurisdiction. The practice of pre-emption is well known to students of International law as a relaxation of the strict rule of confiscation in cases of contraband, where there were circumstances calling for a lenient course. Articles of naval equipment, destined for a naval port, were often thus bought in, where they were the raw produce of the neutral's country, such as tar and hemp. It was thought that, in fairness to neutrals, they must be marketed somewhere, and that it was harsh to confiscate them without payment merely because of their presumed hostile use.

But pre-emption of the appraised value in the captor's country of goods which are presumably innocent, merely because they happen to be forcibly within the jurisdiction, is a very different thing. If such a course could be sustained, a belligerent could cut off neutral trade entirely, simply by bringing in whatever cargoes she chose and buying them *pendente lite* at her own price. No such course has, needless to say, ever been adopted in the past. There are, indeed, two decisions of District Judge Betts (*The Memphis* and *The Ella Warley*<sup>1</sup>), delivered in the American Civil War, in which he asserted the power. But he could adduce no authority beyond his own idea of what the Court "preferred," and he was constrained to admit that the Court in Pennsylvania had declined to do anything of

<sup>1</sup> Blatchf., Pr. Ca. 202, 207.

the sort. And so little did his Government rely on his decisions that they forthwith proceeded to pass a piece of emergency legislation empowering Prize Courts, at the demand of the Government, to effect such requisitions.<sup>1</sup>

Lord Lyons, the British Ambassador, at once protested. The U. S. Government referred the matter to the investigation of the Attorney-General (Bates).<sup>2</sup> While not considering that the Act was unconstitutional, he thought it fortunate that it was not imperative. And he plainly judged it wise to abstain from putting it into force, for, he observes, "I am not aware of any settled doctrine of the Law of Nations to the effect that the belligerent nation whose cruiser has captured a vessel as prize of war, has the right, at its own pleasure and convenience, to appropriate the prize to its own use *before condemnation.*"

---

In the face of this, the original O. XXIX, r. 1, of the new (1914) Prize Court Rules went to the very limit of what was appropriate. "If in a cause for the condemnation of a ship"—pause to reflect that, in the language of the Rules, "ship" includes "goods"—"in respect of which no final decree has been made, it is made to appear on motion . . . . that the Lords of the Admiralty desire to requisition the 'ship,' and that there is no reason to believe that the 'ship' is entitled to be released"—the ship may be appraised and delivered to the Admiralty. Under this rule, as we saw last May,<sup>3</sup> the copper laden on board the *s.s. Antares* was not so released to the Admiralty, as the Court could not say that there was no reason to believe that the goods were not entitled to be released to their owners. Consequently, the rule was re-drafted. On 30th Sept. and 28th Nov., 1915, the protection afforded by

<sup>1</sup> *Prize Act*, 3rd March, 1863.

<sup>2</sup> 10 *Opinions of Attorneys-General (U. S. A.)*, p. 519.

<sup>3</sup> *L. M. & R.*, Vol. XL, p. 345.

the requisition having to be made on motion in Court was withdrawn, and it was allowed to be asked for by summons in chambers. A new rule of 29th April, 1915 (O. XXIX, r. 3), provided that whenever the Crown signifies a desire to have the goods, the judge "shall" release them to the Crown accordingly, after due appraisement. If read literally, this goes beyond the old U. S. Act of Congress, and bars the judge from the discretion which Attorney-General Bates plainly indicated he had better exercise, if international complications are to be avoided. It was, therefore, urged in *The Zamora* (June 14th and 21st, 1915) that the meaning of the new rule must be simply to enable the judge to hand over to the Crown property which is lawfully requisitioned in accordance with the custom of nations. Enemy property might be so requisitioned: property of British subjects might be: property concerned in British or Allied trade with the enemy might. Thus to read the rule would give it a reasonable and by no means a forced interpretation. To read it otherwise would be improperly to impute to His Majesty a design to violate the rights of neutrals—whose goods are not to be taken from them, on payment or not, without due trial. In *The Minerva*,<sup>1</sup> Sir J. Mackintosh read "colonial trade" as meaning "unlawful colonial trade" in order to avoid giving Crown instructions a signification contrary to International law.

#### Municipal Practice in Prize Courts.

Sir S. Evans rejected this contention. The order of pre-emption was, in his view, pure machinery, like an order for sale. As such, it was—again in his Lordship's view—a matter entirely for municipal regulation, and one with which neutrals had no concern. He relied on the

analogy of sale, which he regarded as resting in the arbitrary discretion of the Court, and as applicable in many other cases besides that of perishable goods. As to this analogy of sale, it ought to be remembered that, although Story is careful to include other cases of equally pressing urgency along with that of the perishable nature of the goods, yet these other cases are clearly contemplated by him as being *cujusdem generis* with that. Sale is ordered in such cases because, if the goods were not sold, there would be little or nothing to litigate about: the substratum of the process would be gone. Natural law dictates the propriety of sale in such cases; it does not dictate the propriety of a sale for the convenience of the captor. Moreover, the analogy of sale fails, for a dissentient party to the order can buy the goods in and make what use he pleases of them.

#### Effect of Orders in Council.

Construing the order literally, the learned judge considered himself bound "fully and humbly" to follow Lord Stowell's course in *The Fox*, and to carry out its literal dictates, without regard to whether they were in accordance with International law or not. But *The Fox* has been severely criticised. Duer, the great American authority on Marine Insurance, says<sup>1</sup> :—

"The exercise of belligerent right, by its obstruction of a commerce otherwise lawful, frequently operates as a serious grievance; but the grievance is one to which neutral governments and their subjects are bound to submit. Still, the right is severe in its nature, and it is more especially in such cases that a Court of Admiralty is bound to ascertain that the rules of war have been strictly observed, and that the rights of war have not been exceeded. It is bound to watch the exercise of a right, that in its most legitimate form is an oppressive restraint upon neutral commerce, with a peculiar jealousy, and should never

<sup>1</sup> I, *Marine Insurance*, 644.

permit its necessary evils to be aggravated by a lax indulgence of construction. I have stated these principles nearly in the language of Sir W. Scott—but it is painful to confess that, evidently sound and just as they are, they were not always remembered and followed by that eminent judge in his subsequent decisions.

"I refer to the sanction that he gave to the celebrated Orders in Council of April, 1809, which he defended on the sole ground that they were retaliatory (*The Fox*). The principle that a belligerent power has a right to retaliate upon the enemy by following his example in trampling upon the rights of neutrals is, in its essence, irrational, immoral, and unjust."

And every Continental authority has regarded it as irreconcilable with Stowell's magnificent language in the earlier case of *The Maria*, which we need not quote, as his firm assertion that Prize Courts are "their [the neutrals'] Courts as well as ours" is so well-known.

At any rate, one would have expected that the Court would have looked anxiously for a construction of the rule which would have obviated the necessity of subjecting neutrals to a new and invidious exaction. What will be the position of our merchants, when neutral, if a belligerent can bring them in and take their cargoes at his own valuation? As to the contention that interlocutory procedure is a matter with which neutrals have no concern, it is sufficiently refuted by a reference to the Lee-Murray Memorandum of 1753.<sup>1</sup> That is wholly concerned with procedure, avowedly as a matter in which neutrals have the closest interest; and its authority, as expressive of the practice of every maritime nation, has constantly been received both here and in America.

#### What is a "Branch"?

The effect of the Orders in Council regarding trade with the enemy is to exempt from penal consequences certain

<sup>1</sup> See *Prize Law and Continuous Voyage*. London (Stevens & Haynes), 1915.

transactions, one class of which is transactions with particular "branches." As a "branch" is a conception unknown to the law, this phraseology is somewhat unfortunate. It is uncertain whether any and every agency is a "branch," or whether it must have a certain measure of independence—and, if so, how much. It is also, perhaps, uncertain whether the permission to trade with such branches does more than exempt the trader from penal consequences; it may not confer on the enemy a right of suit in respect of such transactions. On the assumption that it did (in harmony with the suggestion of Lord Skerrington in *Orenstein*<sup>1</sup>), the case of *Wolf & Sons v. Orr, Parker & Co. Ltd.* (29th Apr., 1915) was decided on appeal from Lawrence, J. The partners in the plaintiff firm were three domiciled Wurtemburg subjects named Wolf, carrying on business in Stuttgart. They had what they called a "branch" at Manchester—they are cotton-waste dealers—and they brought the action against Manchester spinners to recover damages under a contract of sale. The Court of Appeal avoided a decision on the thorny question of defining a "branch" by the somewhat unexpected determination that the Proclamations were not in point. No "transactions" had taken place with the branch since the war. Therefore, there was nothing for the Proclamations to operate on. In short, the Proclamations, though they tolerate new "transactions," do not uphold existing "transactions"—and it is very doubtful, therefore, whether new transactions are valid which assume pre-war transactions as their substratum—e.g., payments under *præbellum* contracts.

---

#### Commercial Impossibility.

In *Associated Portland Cement Manufacturers (1900) Ltd. v. W. Cory & Son Ltd.*,<sup>2</sup> Rowlett, J., held that a commercial contract, in spite of the *Coronation Cases*, was not dissolved

<sup>1</sup> [1914], 2 S. L. T. 293.

<sup>2</sup> 14th May, 1915.

by its becoming commercially impossible on account of the war. His lordship took the view that the rule in *Taylor v. Caldwell* still applies only where a specific thing, the foundation of the contract, has ceased to exist. The disturbance of the "return coal trade" from Scotland, on whose continuance the defendants relied when making their contract to carry cement to Rosyth, did not relieve them from it. The case puts a useful check on the dangerous uncertainty which the *Coronation Cases* created. Nor, it was held, did the interference with traffic amount to a "restraint of princes," or to a Government interference under the Defence of the Realm Act (Second Amending Act) 1915, s. 1 (2). Ridley, J., gave a somewhat different decision in *Berthoud v. Schweizer & Co.*<sup>1</sup>

### American Notes.

We are in receipt of various interesting pamphlets and papers from America touching upon questions arising out of the war. It is gratifying, though not unexpected, to find them for the most part thoroughly sympathetic to the Allies' cause. In particular, our attention has been attracted by three able pamphlets by Professor C. Noble Gregory. One is a reprint from the *Harvard Law Review*, and concerns the operation of the Statutes of Limitation in war time. As long ago as 1661 it was held that the interruption of public justice *within* the realm was no bar to the Statute—for it was not within its exceptions.<sup>2</sup> And this was affirmed in general terms by Grant, M.R., in *Beckford v. Wade*.<sup>3</sup> The United States adopt a different rule. The remedy on the suspended right revives on the conclusion of peace in as good a state of preservation as it was before. It may be that the English

<sup>1</sup> 29th April, 1915.

<sup>2</sup> *Druleaux v. Webber*, 1 Lev. 31.

<sup>3</sup> 17 Ves., fo. 87.

Courts would now follow the United States rule; but the Stuart cases seem to be too strong to be evaded. The American plea that at the date of the Statute of Limitations, it was of no use preserving the remedy, since the right was certain to be confiscated, surely cannot alter its interpretation even were it historically true. A Statute is not elastic. Professor Gregory seems to adopt the idea that sect. 23 (h) of the Hague Convention for the Conduct of War on Land prevents a State from excluding hostile aliens from suit in its own Courts, as well as in invaded territory. From the *Columbia Law Review*, Professor Gregory extracts a useful discussion of the burning topic of Contributions and Requisitions, which have been so excessively levied in Belgium. His masterly sketch of the history of the subject errs in only one particular: Calvo's work was not published in 1896—at any rate, for the first time. Professor Gregory is undoubtedly right in deprecating *post-bellum* attempts by one antagonist to sit in criminal judgment on the unlawful deeds of the soldiers of the other.

A short article may also be mentioned, written by the same Author, in the *New York Herald* on Neutrality and Arms Shipments, in which he amply vindicates the legality of the practice of not interfering with the export of munitions by individuals. We may add to his arguments that the practice furnishes neutrals with a powerful weapon to employ if they should need to make their rights respected. It is easy for them to threaten to prohibit such export: it would not be easy for them to threaten to allow it.

TH. B.

## VII.—NOTES ON RECENT CASES (ENGLISH).

THE cases reported from the House of Lords and the Privy Council this last quarter are singularly devoid of interest to the English lawyer. One of them, however, is, in its way, peculiar and amusing.

In *Attorney-General of Southern Nigeria v. John Holt & Co. (Liverpool), Ltd.* (L. R. [1915], A. C. 599), a question arose as to the respective rights of the Crown and of the defendants in land reclaimed by works on the foreshore intended to prevent erosion by the sea. The effect of these works was to cause an artificial deposit along the foreshore, which, in time, consolidated into firm land. On this happening, the defendants treated the land as an accretion to their property which abutted on the foreshore. They built warehouses on it and piers for their ships from it. The Privy Council held that the new reclaimed land, having been created not by natural but by artificial means, belonged to the Crown: but it held further that, since the Crown had acquiesced in the use of the land by the defendants for warehouses and piers, it could not now object to these. In other words, it held that a very new kind of easement had, through the conduct of the Crown, been created—an easement which practically gave a person other than the owner the exclusive use of the land. This, in the head-note to the case, is called a licence, but in the judgment it is called an easement, and the dictum of Lord St. Leonards, in *Dyce v. Hay* (1 Macq. 305), is quoted by Lord Shaw of Dunfermline to justify it: "The category of servitudes and easements must alter and expand with the changes that take place in the circumstances of mankind." Of course, if it is to run with the land, it must be as an easement; a licence is merely personal (see *Taylor v. Waters*, 7 Taunt. 373).

The amusing point about the case is this. Osborne, C.J., held, on hearing the case as judge of first instance, that the Crown had by conduct granted an irrevocable and perpetual licence to the defendants to use the reclaimed land in the ways indicated. When the Crown appealed, the appeal came again before him and his learned colleagues. He then declared that on reconsideration his previous judgment was erroneous and allowed the Crown's Appeal. Now the Privy Council has restored his first judgment, and declared that it is really his second one that is erroneous.

We have before this commented on the fact that a testator who leaves legacies for the benefit of charities is as likely as not to find—if in the next world he is vouchsafed a knowledge of how things are going on in this one—that, in fact, he has left them for the benefit of lawyers. Thus, in *In re Davies, Lloyd v. Cardigan County Council* (L. R. [1915], 1 Ch. 543), an ex-policeman left £50 to the vicar of C., on condition that he and his successors kept the testator's grave in repair, with a gift over on failure to observe this condition to “the superannuation fund of the Cardiganshire Constabulary.” There was no “superannuation fund,” only a “pension fund,” connected with the Cardiganshire Constabulary, and on technical grounds it was not a charity. Held, that the gift over failed. By the time the costs of the summonses to decide this abstruse point are paid, it will matter little, one may surmise, what the decision was.

---

Another testator, with a diabolical design to deprive lawyers of their legitimate share of all funds left for charitable purposes, made the scandalous proposal in his will that if any dispute arose as to the charities which he intended to benefit, this dispute should be decided by his trustees (*In re Raven, Spencer v. The National Association*

for the Prevention of Consumption and other forms of Tuberculosis and Reginald Pratt (L. R. [1915], 1 Ch. 673)). This infamous project was happily foiled. One of his legacies was to "The National Association for the Prevention of Consumption." There was no charity answering this description precisely, but there was one society partially answering it with which the testator had nothing to do and an independent branch of the same society in which he was deeply interested. The Court held (firstly and properly) that who the real legatee was must be decided by the Court, and (secondly, and perhaps improperly) that, as the legatee was described as "the Association," and not as a "Branch of the Association," the branch had no claim, and that no extrinsic evidence was admissible to prove what no sane person can doubt was the testator's intention, namely, that the society which he meant to benefit at his death was the one in which he was interested in during his life.

Finally, in *In re Dawson, Pattison v. Bathurst* (L. R. [1915], 1 Ch. 626), a testator who died in 1891 left the residue of his personal estate, after a life interest, for charitable purposes. His personal estate included debentures charged upon the property of an Australian company. This company's property in England consisted of a leasehold office—of no pecuniary value—and office furniture. And the Court held that, in consequence of this, the gift to the charities failed so far as the debentures were concerned, since they were money charged on land. It is comforting to think that, owing to the Mortmain and Charitable Uses Act 1891, the Court will not often in the future have to give such decisions as this.

The decision in the case of *In re Groos, Groos v. Groos* (L. R. [1915], 1 Ch. 572) seems directly in the teeth of an Act of Parliament. Lord Kingsdown's Act, sect. 3,

declares that no will or other testamentary instrument shall be held to be revoked, *nor shall the construction thereof be altered*, by reason of any subsequent change of domicile of the person making it. Mrs. Groos, while she was domiciled in Holland, made a will in Dutch form and language, appointing her then intended husband successor to her estate "with reservation only of the legitimate portion or the lawful share coming to my relations in a direct line, in so far as they may exist at my death, and may be competent and able to inherit from me." Subsequently she married the intended husband, and later she and he became domiciled and he became naturalised in England. On her death it was held (*In the Estate of Groos*, L. R. [1904], P. 269) that, as by Dutch law subsequent marriage did not revoke her will, her change of domicile could not, under sect. 3 of Lord Kingsdown's Act, revoke it. Now the question of interpretation has arisen. Her change of domicile gave her power to dispose of her personal estate absolutely. And Sargant, J., has held that, in consequence, her reservation of the legitimate portion out of the gift to her husband has no operation. Surely this is altering the interpretation of her will because of her change of domicile? If she had not changed her domicile, would it not have been interpreted according to Dutch law? The case of *In re Bridger* (L. R. [1894], 1 Ch. 297), on which his lordship relied, seems to us, with all respect, to have no application. There the principle that a will must be interpreted as if made immediately before the death of the testator was applied. Here, a foreign will, which but for Lord Kingsdown's Act would have been invalid, is being interpreted as if it were an English will, though that Act says it must be interpreted as a foreign will.

The liking which Chancery judges have always displayed for reversing the decisions of Parliament (of which the

above decision seems to us an instance, but the most flagrant examples of which are those decisions as to secret trusts which have practically repealed the provision of the Wills Act 1837, which requires a will to be in writing) is of late tending to diminish. Thus sect. 93 of the Companies (Consolidation) Act 1908 avoids an unregistered mortgage as against subsequent creditors of the company. In *In re Monolithic Building Coy., Tacon v. The Company* (L. R. [1915], 1 Ch. 643), there were unregistered mortgages. A., with notice of these, advanced money to the company on mortgage and registered his mortgage. Astbury, J., held that since he had notice of the earlier encumbrances, sect. 93 did not apply. The Court of Appeal reversed his decision and refused to read into sect. 93 words which are not in fact there.

*In re Virtle, Vaiani v. De Virtle* (L. R. [1915], 1 Ch. 920), is a decision not quite easy to understand. There a testator, by a will executed not in accordance with the Wills Act 1837, bequeathed personalty to his heir and devised realty away from his heir. The will was effective, under Lord Kingsdown's Act, as to the personalty but ineffective as to the realty. Joyce, J., held that because it was ineffective as to the realty the heir was not put to his election and could take both under the instrument and against it. But is a will ever effective which gives away property not belonging to the testator, and is not this the commonest case of election? The decision seems contrary to *Haynes v. Foster* (L. R. [1901], 1 Ch. 361), which, though dissented from on other grounds (see *In re Hargrove, Hargrove v. Pain* (L. R. [1915], 1 Ch. 398)), has never, to our knowledge, been criticised on this ground.

*In re Ainsworth, Finch v. Smith* (L. R. [1915], 2 Ch. 96), should be noted since it puts a very much needed limit

on the principles laid down in *In re Horne* (L. R. [1905], 1 Ch. 76) as to how far a trustee who has by mistake overpaid a *cestui que trust* at his own expense (he himself being a *cestui que trust*) is permitted to put the trust account right. And *In re Goswell's Trusts* (L. R. [1915], 2 Ch. 106) is also worthy of notice as showing clearly that a trust to sell converts the trust property only from the time when it imposes a duty on the trustees to sell. Conversion by trust for sale is based on the maxim that equity regards that as done which should have been done. Forgetfulness of this has led to such absurd decisions as those of *Lawes v. Bennett* (1 Cox, 167) and *In re Isaacs, Isaacs v. Reginall* (L. R. [1894], 3 Ch. 506).

J. A. S.

## SCOTCH CASES.

In *Carlberg v. The Wemyss Coal Co. Ltd.* ([1915], 1 S. L. T. 412), the pursuer, the owner of the steamer *St. Helens*, claimed demurrage in respect of the detention of his ship at Methil. The *St. Helens* sailed from Gothenburg on 16th November, 1912, and arrived at Methil on the 19th, but when she arrived the bills of lading of the cargo were not forward. It appeared that it was not an unusual occurrence at Methil for the ship to arrive before the bill of lading, and that on such occasions it was the practice of shipowners to give delivery and, if they were in doubt as to the consignees' right to the cargo, they protected themselves by obtaining a bank guarantee from the consignees. On this occasion the consignees offered a bank guarantee, but delivery was refused. On the following day (20th November) an arrangement was come to under which the cargo was discharged, under reservation of the ship's lien, into waggons belonging to the North British Railway Company, and the bills of lading

(which did not impose an obligation to discharge the ship in a definite number of days or hours) arrived while the discharge was proceeding. Meanwhile a delay of over a day had been incurred, in respect of which the pursuer claimed demurrage. The Lord Ordinary (Lord Hunter) recognised that the bill of lading was the title to the goods, and that the master was not bound to give delivery if it was not produced, but he gave judgment for the defenders on the ground that, in view of the practice, the pursuer's refusal of the offer of a bank guarantee was unreasonable, and that the detention was thus due to his unreasonable conduct. The First Division adhered, but the learned judges proceeded on different grounds. The Lord President held that when the bill of lading had not reached the consignee, it was the duty of the shipowner either to land the cargo under reservation of the ship's lien, or, if that were impracticable, to discharge into the waggons of the consignees on receiving a suitable indemnity. Lord Johnston held that the pursuer was technically in the right, and that he was not bound to accept the offer of a bank guarantee, or, unless asked, to take instant measures for discharge under reservation of the ship's lien, but that in the circumstances he was only entitled to nominal damages. Lord Skerrington held that the defenders were not in breach of their contract as their sole obligation with regard to the discharge of the ship was to discharge as quickly as possible in the circumstances, and that obligation had been fulfilled. The Lord President's ground of judgment seems somewhat dangerous. It is a strong thing to say that the shipowner was bound as matter of contract to deliver in return for a bank guarantee, although it may very well be that if his refusal to deliver is unreasonable any detention of the ship should be held to have been caused by his own act. On the other hand, the time which elapsed before the cargo was discharged into the railway company's waggons was very

short—only twenty-five hours—and it is not easy to maintain that the shipowner was acting unreasonably in not arranging that matter earlier. Lord Skerrington's ground of judgment seems unexceptionable.

In *Cotton's Trustees v. Farmer* ([1915], 2 S. L. T. 2) the House of Lords has given a very wide construction to the exemption from Inhabited House Duty conferred by sect. 13 of the Customs and Inland Revenue Act 1878. Under the section, where a house is divided into and let in separate tenements, and any of such tenements are used solely for business purposes, the tenements used for business purposes are exempt. The House of Lords has now held that an office consisting of a single room and shut off by a door from a common passage is a separate tenement and entitled to exemption. The noble and learned Lords who formed the majority of the House affirmed the propositions: (1) That a single room may be a tenement in the sense of the section; and (2) That a door is a sufficient structural separation. (As the Commissioners had found, in fact, that the building in question was not divided into separate tenements, no escape from the generality of these propositions is possible.) It may be true, as Lord Parker says, that there is no previous case which is inconsistent with this decision, but Lord Sumner's dissent seems to be more consonant with the views which have generally been entertained on the subject.

The case of *Baker v. The Corporation of Glasgow* ([1915], 2 S. L. T. 45) turned on the construction of sect. 166 of the Public Health Act 1897, which enacts that any action against any person acting under the Act on account of any wrong done in or by any action, proceeding or operation under the Act shall be commenced within two months after

the cause of action shall have arisen. The pursuer averred that he had been run down by a motor car belonging to the defenders owing to the negligence of the driver. The defenders, who were a local authority under the Public Health Act, averred that the driver was employed by them as an ambulance driver attached to a fever hospital belonging to them, that he was solely under the control of the superintendent of the hospital, and that at the time of the accident the car was being used as an ambulance in the ordinary course of its work in conveying a patient to the hospital. They pleaded that the action, not having been raised within two months of the accident, was excluded by the terms of sect. 166. Lord Ormsdale repelled the plea, holding that the wrong done to the pursuer was not done in an action, proceeding, or operation under the Statute. From the pursuer's point of view, the action in which the defenders' servant was concerned was confined entirely to running him down; under the Statute they had no right to interfere with the pursuer, and it was no concern of his that they happened to be exercising their powers in reference to a patient.

Lord Anderson's judgment in *John Milligan & Company, Limited v. The Ayr Harbour Trustees*, which was noticed in our November number, has been affirmed by the Second Division ([1915], 2 S. L. T. 69). The facts, shortly stated, were that the pursuers, a firm of shipowners who had sent their ship to load at Ayr Harbour, were involved in a labour dispute at Belfast, and the labourers at Ayr refused to load her. The pursuers offered to supply labour for the purpose, but the defenders, the harbour authorities, refused to permit them to do so, as they were apprehensive of a strike resulting, which would cause a stoppage of traffic at the harbour and possibly lead to destruction of property. In consequence, the vessel was detained for some days and ultimately had to

sail without a cargo, and the pursuers claimed damages from the defenders. The Court held that, under the Statutes applicable to the harbour, the defenders, if they could not themselves supply labour to work the vessel, were bound to admit the workmen whom the pursuers proposed to employ, and they rejected the argument that fulfilment of the statutory obligation had become impossible. They also rejected an argument founded on sect. 3 of the Trade Disputes Act 1906 that the refusal to admit outside labour was not actionable, as being an act done in contemplation or furtherance of a trade dispute. The defenders maintained that the refusal was an act done in contemplation or furtherance of a trade dispute between them and their employees, as to the admission of outside labour into Ayr Harbour. The Court held that the refusal could not be an act done in furtherance of a trade dispute, because no trade dispute had as yet arisen between the defenders and their employees. They also held that a trade dispute was not contemplated in the sense of the Act unless it was contemplated by both parties, that on the evidence it was not proved that the defenders' employees contemplated a general strike, and that the mere fact that the defenders feared that a strike would result was not sufficient to bring the case within the Act.

In *Peebles v. Cowan & Co.* ([1915], 1 S. L. T. 363) a father brought an action against a firm of carting contractors for damages for injuries sustained by his son, a boy of six. The pursuer averred that his son and another boy were playing in a street when a lorry belonging to the defenders and driven by one of their servants passed through the street. The boys climbed on to the lorry and were driven for a considerable distance. The pursuer averred that the driver saw the boys climb on to the lorry and allowed them to remain there without objection; that after a time he

ordered the boys to get off, but did not slow down to enable them to do so in safety, and that in attempting to reach the ground the pursuer's son was seriously injured. Lord Anderson dismissed the action on the ground that the driver was not acting within the scope of his employment. It is of course clear that the driver was not acting within the scope of his employment when he allowed the boys to get on to the lorry. But, as Lord Anderson says, when the boys came on to the lorry, it was his duty immediately to put them off. We should have thought that when he did order them to go off, he was acting within the line of his duty, and that the defenders were liable for his negligence in not stopping or slowing down. This point did not arise in *Houghton v. Pilkington* (L. R. [1912], 3 K. B. 308), which Lord Anderson quotes in support of his judgment.

In *Aldin v. Stewart* ([1915], 2 S. L. T. 48) the question was whether an injured workman, who had accepted certain weekly payments from his employers, had "recovered compensation" in the sense of sect. 6 (1) of the Workmen's Compensation Act 1906, and was thus barred from suing a third party at Common law. The workman had granted a number of receipts for the payments he had received. The earliest of these described the payment as "compensation." Then there followed a series of simple acknowledgments of money received without reference to compensation. Subsequent receipts were to be "without prejudice," and later still, "without prejudice and under reservation of claims against third parties." Lord Dewar rejected the pursuer's contention that compensation was "recovered" in the sense of the section only if it were recovered under legal process. But he held that the action was excluded only if the workman had exercised the option which the Act conferred on him. On the facts, the learned judge held that when he signed the earlier receipts, the workman did not know that

he had a choice of actions, or that acceptance of compensation barred him from suing at Common law. Accordingly he held that the workman had not made an election, and was entitled to proceed with his action.

J. S. M.

### IRISH CASES.

There are some rules which seem to exist mainly for the purpose of being "distinguished." *Watson v. Donaldson* ([1915], 1 Ir. R. 63) shows the Court of Appeal struggling to escape from one of these—the rule of construction laid down by the House of Lords in the old case of *Creswell v. Cheslyn* (2 Eden 123), and succeeding in their escape, on the well-worn ground that the words of the particular will under consideration sufficiently indicated a contrary intention. *Creswell v. Cheslyn* decided that if there is a devise or bequest of residue to a number of persons *nominativ* as tenants in common, and subsequently a revocation of the devise or bequest of one of the shares, that revoked share does not fall into the residue but becomes undisposed of. In the present case it seemed at first sight as if this rule should apply. A testator gave his residuary personality on trust for his sister for life, and after her death upon trust for five named persons, or such of them as should be alive at the death of the survivor of his sister and himself, in equal shares. A codicil revoked the gifts to two of these five persons. All five survived the testator and his sister. In the Court below, the case against an intestacy as regards these two shares was argued on the ground that the gift was to a class: this is a recognised exception to the rule, but the contention was rejected both by the Master of the Rolls and the Court of Appeal, for there was absolutely no common feature among the five persons which could show that they

were treated as a class. But the Court took hold of the words "or such of them as shall be alive at the death of my sister and myself." This, they thought, indicated an intention that if the number of the legatees was diminished before that time, the whole gift was to go among the diminished number; and they thought that it made no difference whether such diminution took place by the death of a legatee or by the act of the testator. "Down to the death of the survivor of the testator and his sister, the residuary legatees may be regarded as taking jointly."

It may be noted that in the recent case of *In Re Whiting* ([1913], 2 Ch. 1)—which was not cited in *Watson v. Donaldson*—another way of escape was found. There the will had given residue on trust to divide it equally between forty-six named persons; a codicil had revoked the gift of shares to two of these persons, and in all other respects had confirmed the will (as did the codicil in *Watson v. Donaldson*). It was held that, although this was not a class-gift, still there was no intestacy, but that the whole residue passed under the will as *altered and re-published* by the codicil, to the named persons, omitting the two whose gifts were revoked. Evidently, if *In Re Whiting* is correct, the rule in *Creswell v. Cheslyn* is in most cases practically gone. It would go unregretted by Joyce, J., who says, "after what has been said about *Creswell v. Cheslyn* by some of the most eminent judges, I suppose that, in any case that was precisely the same in all its circumstances, one ought to follow *Creswell v. Cheslyn*, leaving the Court of Appeal or the House of Lords to reverse the decision."

---

The Irish Land Act 1903, by sect. 48, provides that in normal cases a landlord-vendor, who sells lands to tenant-purchasers under the machinery of the Act, shall receive, in addition to the price which will ultimately be repaid by the tenant-purchasers to the Land Commission, a percentage or

"bonus" paid to him out of the Land Purchase Aid Fund. The attempt to define the legal nature of this bonus has led to some conflict of decision between English and Irish Courts. In *Heard v. Gabbett* ([1915], 1 Ir. R. 213), Ross, J., gives a further description of it, chiefly negative. It is not an interest in the lands sold, nor is it part of the proceeds of sale of the lands. The decision of Eve, J., in *Tremayne v. Rashleigh* ([1908], 1 Ch. 681), to the effect that it is an interest in the lands, is expressly disapproved. It is "a personal thing given as an inducement to an owner to sell lands"—an improvement on the older and more vague description of the bonus as "a by-product of the sale." The present case held directly that it did not pass under a gift by will of "my property being sold to tenants under the Irish Land Act 1903 and the proceeds thereof when sold."

Without going into the facts of *Murphy & Co., Ltd., v. Crean* ([1915], 1 Ir. R. 111), some observations as to the nature of a publican's licence in Ireland, and the impossibility of severing the property in it from the property in the licensed premises, may be noted. Such a licence is an authority to a named person to carry on trade in a specified house. There is not in the whole licensing code any provision for the transfer of a licence from one house to another house. An attempt to create property in a licence, apart from the premises, is illegal. "A severance of licences from licensed premises, to be dealt with apart from and irrespective of the premises, and when separated to be manipulated in the interest of private individuals for their personal profit or gain, is not permitted by law."

A small difference in practice between Ireland and England is shown by *Bradshaw v. McMullen* ([1915],

2 Ir. R. 187) : compare *Williams v. Hunt* ([1905], 1 K. B. 512). In Ireland, if a mortgagee issues an originating summons under Ord. LV, r. 7, there is no jurisdiction thereon to make a personal order for payment of the mortgage-debt. Therefore if the mortgagee, pending such proceedings, sues in the King's Bench Division on the covenant for payment, that action will not be stayed.

The decision of the majority of a Divisional Court in *Allen & Sons v. King* ([1915], 2 Ir. R. 213) has been affirmed by the Court of Appeal. As the decision on appeal has not yet been reported, full comment may be deferred until the report appears. It may here be noted that the case, in one aspect, involves a consideration of the effect of *Hurst v. Picture Theatres, Ltd.* ([1915], 1 K. B. 1), as to the irrevocability of a patent licence given for value and relating to land. By an unsealed writing A. gives to B. the right to affix posters and advertisements to the wall of a building proposed to be erected on A.'s premises by a company not yet formed, for four years from a given date or from the opening of the proposed building for business, in consideration of an annual payment. A. afterwards demises the premises to the company, who have notice of the licence, but whom A. does not effectively bind to give effect to it. The company refuse the permission granted by the licensee ; held, that B. can sue A. for damages.

J. S. B.

## Reviews:

[SHORT NOTICES DO NOT PRECLUDE REVIEWS AT GREATER LENGTH IN SUBSEQUENT ISSUES]

*War: Its Conduct and Legal Results.* By T. BATY, D.C.L., LL.D., and J. H. MORGAN, M.A. London: John Murray. 1915.

The Authors are entirely justified in their claim that in this book they are breaking fresh ground. Works on International law of every complexion abound, but, as far as we know, not one dealing with the effect of War upon our own Municipal law is in existence. When we remember that, with one brief interval, this country has been free from European conflict for just a century, this omission is not surprising. During this period enormous changes have taken place in every department of human activity, which have given birth to new problems, or perhaps, as the Authors prefer to put it, to old problems in a new guise. Upon the effect of war upon the laws of the realm, the Common law has much to say. The safety of the realm and the prerogative of the Crown in relation thereto have in the past been fully discussed in the Courts, and the principles upon which the latter may be exercised have been declared. But the power of the Crown when England is "at war" without the English realm being in a state of war has not hitherto been explored adequately, if at all, by any writer. In this branch of the law and in many others doubt and confusion are only very slowly being dispelled by the decisions of the Court, and the emergency legislation, which is the subject of strong criticism by the Authors, has once more undergone revision by the Legislature. This book, however, is written less for the jurist than for the man in the street—"the man who is concerned about his duties, in the event of invasion, at home, and the soldier with his rights abroad, the special constable, the sheriff, the magistrate, the recruit, the trader, the shipowner, and the newspaper proprietor." Whilst, however, the Authors seek to make the law clear and simple for the average citizen, they do not hesitate to question the doubtful legality and the propriety of some recent Statutes. In the case of the Defence of the Realm Act, for instance, they doubt whether the Government under this Statute is entitled to issue new regulations outside the scope of those specified in the Act.

With regard to the trial of civilians by Courts-Martial, they take the view expressed in the last number of this Review, that whilst the King's Courts are sitting and juries can be empanelled, the subjection of the lives of private citizens to military law is entirely unjustifiable. That part of a single afternoon, they observe, should have been thought sufficient for the Committee stage of the Bill is a curious commentary on the vigilance of the House of Commons. Although both Authors accept a joint responsibility for the book as a whole, acting in consultation with each other throughout, each has undertaken those subjects with which he is especially conversant. Dr. Baty is a recognised authority on International law and Professor Morgan on Constitutional law. For the compilation of a work dealing with grave problems, only to be solved by a profound knowledge of both these subjects, the Authors constitute an exceptionally powerful combination.

---

*A Manual on the Principles of Roman Law.* By R. D. MELVILLE, K.C., M.A., I.L.B. Edinburgh: W. Green & Son. 1915.

This book is primarily intended for the use of Egyptian law students. The Egyptian Native Codes are based principally upon the French Codes, and a sound knowledge of the principles of Roman law is therefore imperative for the Egyptian law student. Since the latter has no acquaintance with the Latin language, the ordinary text-books on Roman law are valueless, since it is impossible to expound the subject to him either directly or by way of commentary upon the Latin texts. The most practicable alternative, therefore, was to present a statement in such language as could be understood, and in such a manner as would compensate for a lack of classical education, of the main principles of Roman law. With this object the learned Author has treated, in self-contained divisions, the main principles of the *Corpus Juris Civilis*, relating to Persons, Property and Obligations, in so far as these form the foundation of modern legal science. Both in the historical Introduction and in the text Mr. Melville has, with marked success, indicated the course of the development of Roman legal institutions and principles, so essential to a true appreciation of any legal system. In addition to full citation of the Latin texts and other authorities, frequent references are made to the French Civil Code and to French authorities. A useful bibliography is added. An Advocate of the Scottish Bar and Professor of Roman Law in the Khedival School

of Law at Cairo, Mr. Melville is peculiarly well qualified for the task he has undertaken. His exposition of the law is eminently able, and the principles are enunciated with commendable lucidity and precision. We confidently recommend this book to all students of Roman law and Roman institutions.

*Railway and Canal Traffic Cases.* Vol. XV. By RALPH NEVILLE, LL.M., and W. A. ROBERTSON, B.A. London : Sweet & Maxwell. 1914.

The cases reported in this volume are those which were heard in the latter part of 1911, 1912, 1913 and up to July, 1914. To the practitioner in this class of business these reports are, of course, indispensable. Decisions upon points of practice are both numerous and important. In *National Telephone Co., Ltd., v. Postmaster-General*, for instance, it was held by the House of Lords that an appeal lay to the Court of Appeal from the Railway and Canal Commissioners to whom questions had been referred by agreement between the parties. Another important decision is that in *General Electric Co., Ltd., v. Great Western Ry. Co.* upon discovery. The paucity of undue preference cases is still very marked. Whether this proves the absence of injustice on the part of the companies or the inability of traders to prosecute their complaints before the Commissioners cannot be discussed here.

*Chitty's Annual Statutes, 1914.* By W. H. AGGS. London : Sweet & Maxwell. 1915.

*Butterworths' Twentieth Century Statutes, 1914.* Edited by H. H. KING. London : Butterworth & Co. 1915.

The first of these books forms Vol. 18, Part I of the supplementary volumes to the sixth edition of *Chitty's Statutes of Practical Utility*. Of the 191 Public General Statutes passed in the two recent Sessions of Parliament, 72 have been selected as within the scope and meaning of this work. Apart from those enactments termed Emergency Legislation, the most important Acts, perhaps, are the Deeds of Arrangements Act 1914 and the Bankruptcy Act 1914. The notes to both these Statutes are in the main taken from *Williams' Bankruptcy Law* (1915 Ed.), edited by Mr. E. W. Hansell. In addition to the Emergency Statutes, such Royal Proclamations having a statutory force and as are of practical utility

have been printed together with many statutory Rules which are essential to the proper interpretation of the Acts. References are brought up to the end of the year.

Butterworths' Annual is not confined to the Statutes of practical utility, but contains all the Public General Acts passed in 1914, excepting those only in force in Scotland and the Isle of Man. For the notes to the Merchant Shipping (Convention) Act 1914, Merchant Shipping (Certificates) Act 1914 and the Prize Courts (Procedure) Act 1914, Mr. Stuart Moore is responsible, and for the notes to the remaining Statutes, the General Editor, Mr. H. H. King. As many of the Emergency Statutes are of a temporary nature, the Editor has collected them at the end of the volume under the title of "War." Those already repealed have been printed in italics. No Statutory Rules and Orders are printed, but references to them are given throughout. These are brought down to February 1st, 1915.

---

*A History of French Public Law.* By JEAN BRISAUD. Translated by JAMES W. GARNER. With Introductions by HAROLD D. HAZELTINE and WESTEL W. WILLOUGHBY. London: John Murray. 1915.

This constitutes the fifth volume of the Continental Legal History Series published under the auspices of the Association of American Law Schools. "All history," said Maitland, "is but a seamless web; and he who endeavours to tell but a piece of it must feel that his first sentence tears the fabric." This seamless web of American legal history unites Americans insparably to the history of Western and Southern Europe, and it is no less true of English legal history. In the creation of Western Continental Law we see two great forces struggling for predominance—Germanic custom and Roman law. In England all the racial threads—Saxon, Danish, Norman—were but extensions of the same Germanic warp and woof that was making the law in France, Germany, Scandinavia, Netherlands, Austria, Switzerland, Northern Italy and Spain. And its legal culture was never and nowhere without some of the same intellectual influence of Roman law which was so thoroughly overspreading the Continental peoples.

In the development of both American and English law, the value of the comparative study of legal institutions is now generally recognised. "Jean Brissaud's *Cours d'histoire générale du droit français*

*public et privé*, published in 1904, already ranks," says Mr. Hazeltine, "as one of the masterpieces of Continental legal literature. It not only consolidates the results of researches by Viollet, Flach, Luchaise, Esmein, Fustel de Coulanges, and other scholars, but it also supplements the writings of these historians with the new learning that issued from Brissaud's own indefatigable study of the original sources themselves. Both in its substantial contribution to knowledge and in its literary charm, Brissaud's great work will always be viewed as one of the most remarkable products of the new historical school."

In tracing the origin and growth of French legal institutions and ideas, Brissaud has systematically employed both the historical and the comparative methods. "In no other work available in English," says Professor Willoughby, "is there to be found an account comparable in learning to that which Brissaud has given us of the steps by which, from the earliest times, the political institutions of France have come into being and developed until the present constitutional period is reached." In the disputes between the Germanists and Romanists, Brissaud endeavours to deal impartially. When the evidence for extreme conclusions is weak, he preserves an open mind; but when the evidence is incontestable, he does not hesitate to accept a conclusion regardless of whether it supports the German or the Roman School.

By his premature death in 1904, writes Mr. Paul Thomas, his successor in the Chair of Legal History in the University of Toulouse, "science has lost one of its most devoted apostles; France one of its noblest reputations; and the University of Toulouse an eminent professor who has powerfully contributed to spread its influence and its fame."

---

**Third Edition.** *A Text-Book of Medical Jurisprudence and Toxicology.* By JOHN GLAISTER, M.D., D. Ph. (Camb.), F.R.S.E. Edinburgh: E. & S. Livingstone. 1915.

This work was originally concerned with Medical Jurisprudence, Toxicology and Public Health. In the second edition, which appeared in 1910, the last subject was omitted and dealt with in a separate volume in order to allow further treatment for the former subjects. In the present edition some chapters have been rearranged, others abbreviated and some extended. A short sketch of the General Medical Council, its duties and statutory power, together with a full account of its final resolutions has been added. The

index has been much improved by additional detail, and the book as a whole brought up to date. As Professor of Forensic Medicine and Public Health in the University of Glasgow, and Senior Medico-Legal Examiner in Crown Cases for Glasgow and Lanarkshire, Dr. Glaister is peculiarly qualified to write on the subjects here discussed. He writes, not only with the authority of a professor, but with that of a specialist, who has been constantly engaged to assist in the detection of crime. Throughout this work Dr. Glaister gives, wherever relevant, the results of his own varied experience. The numerous plates illustrating cases of special interest add much to the value of the book. We are not surprised to hear that this edition has been called for by students and practitioners of both law and medicine at home and abroad.

---

**Fourth Edition.** *The Law of Carriage by Railway.* By HENRY W. DISNEY, B.A. London: Stevens & Sons. 1915.

Since the publication of the third edition of this book in 1912 there has been little change in the law. The work was originally intended for the use of railway men, being the result of the learned Author's lectures delivered at the London School of Economics and Political Science, to students, almost all of whom are in the employment of the great railway companies. In the interests of this class, legal technicalities have been avoided as far as possible. Finding, however, a certain demand for the book from the legal profession, Mr. Disney has tried to make the present edition more useful for legal practitioners by citing a number of additional cases. Short chapters on "Facilities" and "Preference" have been added. These are models of precision and lucidity.

---

**Fifth Edition.** *Archbold's Lunacy and Mental Deficiency.* By J. W. GREIG, K.C., and W. H. GATTIE. London: Butterworth & Co. 1915.

It is just twenty years since the fourth edition of this standard work, edited by the late Mr. S. G. Lushington, appeared. Since 1895 the law relating to lunacy and cognate matters has very naturally undergone a considerable change. New Statutes have been not only numerous but voluminous, and consequently the bulk of the book has been increased. The new Statutes are the Lunacy Acts of 1908 and 1911, the Mental Deficiency Act 1913, the

Asylums Officers' Superannuation Act 1909, and the Lancashire County (Lunatic Asylums) Act 1902. Additional Lord Chancellor's and Commissioners' Rules have been prescribed, and some of the old Rules annulled or modified. The former arrangement of the work has, as far as possible, been maintained. Part I deals with the Lunacy Acts as before. References to the repealed Acts have generally been deleted. Part II is devoted to Criminal Lunacy. With the exception of bringing this portion of the work up to date, it is practically untouched. Part III, which deals with the Mental Deficiency Act, together with the Rules of the Home Secretary and other regulations under the Act, is of course quite new. All the statutory forms, registers, &c., have been revised, and together with the Rules brought up to date, and by a careful examination of recent decisions many doubtful points of construction in the various Statutes have been cleared up. Additional extracts from the Commissioners in Lunacy have been incorporated in the text, and, in some instances, these extracts are accompanied by the opinion of the Law Officers of the Crown upon points of law. Above all, the Index has been recast in such a way as to secure more accuracy and rapidity of reference. In short, no pains have been spared either by the Editors or by the Publishers to render this book the most authoritative treatise upon a highly technical branch of the law.

---

**Eleventh Edition.** *Williams' Bankruptcy.* By E. W. HANSELL and M. E. HANSELL. London : Sweet & Maxwell. 1915.

The appearance of a new edition of this standard work within twelve months of the publication of the preceding edition is due to the subsequent passing of the Bankruptcy Act 1914 and the Deeds of Arrangement Act 1914. The former statute, a purely consolidating measure, incorporates the provisions of the Acts of 1883, 1890 and 1913. Some sections, however, of these Acts, relating to disqualifications, executions and administration orders in County Courts, which are not strictly bankruptcy matters, are left unaltered. These, for convenience of reference, are printed at the end of the volume. This Statute, abundantly annotated, together with the Bankruptcy Rules 1915, Bankruptcy Forms, Orders and Regulations, constitutes the major portion of the text. In the Appendix will be found the Debtors Act 1869, as amended, annotated, the Debtors Act 1878, the Bankruptcy Disqualification Act 1871, the Deeds of

Arrangement Act 1914, annotated together with the relevant Rules and Orders, and Board of Trade Orders and Circulars. Upon comparison with the former edition, it will be seen that the general scheme of the book has been left unaltered. A valuable feature is the addition of tables of comparison with the repealed Acts to the Bankruptcy Act and the Deeds of Arrangement Act respectively. It would, we think, have been more convenient to have printed these references to the repealed sections in the margin of the corresponding sections in the text. The decisions of the Courts are cited down to January, 1915, inclusive. It is satisfactory to find that it has not been necessary to increase the bulk of the book.

---

**Twelfth Edition.** *Company Law and Practice.* By HERBERT W. JORDAN. London: Jordan & Sons. 1915.

The main object of this book is to set out concisely under various heads in alphabetical order the requirements of the Companies Acts 1908 and 1913 together with the provisions of the Stamp Act 1891 and of such other Statutes as are relevant to the subject. The text has been carefully revised and brought up to date. Appendix A consists of a series of very useful hints for secretaries and Appendix B contains the Act of 1908. The new Treasury restrictions on issues of capital are printed in Appendix C. The Author is dissatisfied with the decision of the Court of Appeal in *Continental Tyre and Rubber Co. (Great Britain), Ltd., v. Daimler & Co., Ltd.*, in which it was held that an action for the recovery of a debt is maintainable by an English company of which the directors and shareholders are alien enemies. This decision is considered by some of our leading jurists to be bad law. The Author calls for the interference of Parliament.

---

**Seventeenth Edition.** *Snell's Principles of Equity.* By H. BEVINGTON and A. CLIFFORD FOUNTAINE. London: Stevens & Haynes. 1915.

The last edition of this familiar text-book, published in 1912, was edited by the late Mr. Archibald Brown, who had been responsible for the previous twelve editions. The present Editors are both solicitors who have been engaged for many years in the instruction of law students. In the preparation of the present edition the Editors have departed as little as possible from the general arrangement and language of the work, although, in a large

measure, they have recast the text. A short chapter on the effect of the Judicature Acts is the only notable addition. The chapters on Interpleader and Auxiliary Jurisdiction have been omitted. The introductory chapter on the nature, origin and history of equity, is certainly a great improvement, but it might easily have been made much greater. It is still much too sketchy and it is not quite up to date. The Editors appear to be unaware of the equitable jurisdiction exercised by the Common-law Courts of the 13th century. In the *Eyre of Kent*, and in *Select Bills in Eyre*, Mr. Holland has shown that such jurisdiction was in existence at least as early as 14 Edw. I. The Editors therefore are in error when they assert that such relief as injunctions to restrain could not be obtained from a Common-law Court before the reign of Edward III. For instance, Isabel Loche, 20 Edw. I, asks for an injunction to restrain her son from preventing the payment of her rents to her and from forcibly entering her house. For practitioners such legal history may be negligible, but the student is entitled to a correct statement, if legal history, however brief, is to be given at all.

*The Annual Digest of English Case Law, 1914.* By JOHN MEWS. London: Sweet & Maxwell. 1915.—This constitutes the fourth annual supplement to the *Digest of English Case Law*, so indispensable to the practitioner. The present volume contains, as usual, all the reported decisions of the superior Courts, with a selection from the Scottish and Irish Courts. Once more a list is added of all cases in any way affected by the decisions of the year 1914. This list is also issued separately for convenience in noting up.

---

*Butterworth's Yearly Digest, 1914.* Edited by H. COOPER. London: Butterworth & Co. 1915.—This constitutes the first annual supplement to *Butterworth's Sixteen Years' Digest 1898-1913*. It contains the decisions reported during the year 1914, and includes notes of all cases reported in the *Law Reports* for January, 1915. In addition, a full selection of Irish and Scottish cases have been included, together with list of cases affirmed, reversed or considered, and of Statutes referred to in cases contained in *The Digest*. The head-notes of English, Irish, and Scottish cases are here reprinted in the text by the permission of the several Councils of Law Reporting; of the Editors of the *Irish Law Times* and the *Scottish Law Reporter*; and of the Publishers of the *Law Journal Reports*.

**Fifty-second Edition.** *Every Man's Own Lawyer.* By a Barrister. London: Grosby, Lockwood & Son. 1915.—The present edition of this book has been thoroughly brought up to date, and contains the war emergency legislation. To produce a complete and reliable epitome of the laws of England in 800 pages is, without question, a notable performance, and if the book is used with caution, it should prove invaluable in the ordinary affairs of life. It will not dispense with the services of a solicitor where such are required, but it will help laymen to understand those elementary rights and duties which every citizen ought to know. This is distinctly a useful and practical compendium of the law from which a layman can ascertain his legal position in situations which might otherwise be inexplicable.

Books received, reviews of which have been held over owing to want of space:—*Bullen and Leake's Precedents*; *Bythewood and Farman's Precedents*; *Hanson's Death Duties*; *Harris' Illustrations in Advocacy*; *Trehern's British and Colonial Prize Cases, Part 1*; *Kingwood's Bankruptcy*; *Copinger's Copyright*; *Settle and Baber's Law of Public Entertainments*; *Preparation of Bills of Costs under the Workmen's Compensation Act 1906*; *Engelbach's More Anecdotes of Bench and Bar*; *Alexander's Administration of Criminal Justice*; *Huberich and Speyer's German Legislation for the Occupied Territories of Belgium*; *Pollack's Partnership*; *Hewitt's Taxes on Land Values*; *Stringer's High Court Emergency Practice*; *Roxburgh's Prisoners of War Information Bureau in London*; *Trotter's Law of Contract during War, Supplement*; *Reale, Bartolus on the Conflict of Laws*; *Encyclopedia of the Laws of England, Supplement*; *Phillipson's International Law and the Great War*; *Buchanan's Forensic Medicine and Toxicology*; *Smith's Leading Cases*; *Borchard's Diplomatic Protection of Citizens Abroad*; *Kustomji's Law of Limitation*; *Hibbert's Law Proceedings*.

Other books received:—*Mowat, Oxford Pamphlets XVIII, Select Treaties and other documents relating to the European War*; *Emergency Legislation*, Vol. No. 3; *the Law and Continuous Voyage*; *Ramanatha Mitter's Registration of Copyright in Ancient India*; *Emergency Legislation—Financial*; *Reports of the Indian War Association*, Vol. 39.

The *Law Magazine and Review* receives or exchanges with the following amongst other publications:—*Juridical Review*, *Law Times*, *Law Journal*, *Justice of the Peace*, *Law Quarterly Review*, *Irish Law Times*, *Australian Law Times*, *Canada Law Journal*, *Canada Law Times*, *Chicago Legal News*, *American Law Review*, *Harvard Law Review*, *Case and Comment*, *Green Bag*, *Mauritius Law Journal*, *Calcutta Weekly Notes*, *Law Notes*, *Law Student's Journal*, *Bombay Law Review*, *Indian Review*, *Kathicawar Law Reports*, *The Lawyer (India)*, *South African Law Journal*.









